

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1918

No. 221

INTERNATIONAL NEWS SERVICE, PETITIONER,

THE ASSOCIATED PRESS.

ON WRIT OF HABEAS CORPUS TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE SECOND CIRCUIT.

WRITING FOR CERTIORARI FILED JULY 14, 1917.
CERTIORARI AND RETURN FILED OCTOBER 12, 1918.

(26,035)

(26,035)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1917.

No. 568.

INTERNATIONAL NEWS SERVICE, PETITIONER,

vs.

THE ASSOCIATED PRESS.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES
CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

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a United States Circuit Court of Appeals for the Second Circuit.

THE ASSOCIATED PRESS, Complainant-Appellant,
against

INTERNATIONAL NEWS SERVICE, Defendant-Appellee.

INTERNATIONAL NEWS SERVICE, Defendant-Appellant,
against

THE ASSOCIATED PRESS, Complainant-Appellee.

Certified Transcript of Record on Appeal and Cross-appeal from the District Court of the United States for the Southern District of New York.

Stetson, Jennings & Russell, Solicitors for Complainant, 15 Broad Street, Borough of Manhattan, New York City.

William A. De Ford, Solicitor for Defendant, 140 Nassau Street, Borough of Manhattan, New York City.

1 *Petition and Order Allowing Appeal.*

United States District Court, Southern District of New York.

In Equity.

No. E. 14-59.

THE ASSOCIATED PRESS, Complainant,
against

INTERNATIONAL NEWS SERVICE, Defendant.

To the Honorable Judges of the District Court of the United States for the Southern District of New York:

Your petitioner, The Associated Press, conceiving itself aggrieved by the order made by this Court on the 13th day of April, 1917, in the above-entitled proceedings in so far as it denies a writ of injunction restraining defendant from copying, receiving, selling, transmitting, using, or causing to be copied, received, sold, transmitted or used, the news furnished by complainant from bulletins issued by the complainant, or any of its members, or from editions of newspapers published by any of complainants' members, does hereby petition for an appeal from said decree to the United States

Circuit Court, for the Second Circuit, and prays that its appeal may be allowed, and that a transcript of the record and evidence in said proceedings, duly authenticated, may be transmitted to said United States Circuit Court of Appeals, for the Second Circuit.

Dated, New York, April 13th, 1917.

THE ASSOCIATED PRESS.

By STETSON, JENNINGS & RUSSELL,

Its Solicitors.

The foregoing appeal is hereby allowed this — day of April, 1917, and cost bond waived by consent.

AUGUSTUS N. HAND,

United States District Judge.

A cost bond on the above appeal is hereby waived.

WILLIAM A. DE FORD,

Solicitor for Defendant.

Petition and Order Allowing Cross-Appeal.

United States District Court, Southern District of New York.

In Equity.

No. E. 14-59.

THE ASSOCIATED PRESS, Complainant,

against

INTERNATIONAL NEWS SERVICE, Defendant.

To the Honorable Judges of the District Court of the United States for the Southern District of New York:

The Associated Press, complainant in the above entitled cause, having obtained an allowance of an appeal from that portion of the order made by this Court on the 13th day of April, 1917, denying its application for an injunction; and your petitioner, International News Service, considering itself aggrieved by the order made by this Court on the 13th day of April, 1917, in the above entitled proceeding, in so far as it grants a writ of injunction restraining the defendant

From inducing, procuring or permitting any telegraph editors or other employees or agents of the complainant or any of its members or any newspaper or newspapers owned or represented by them or any of them, or any such members, to communicate to defendant or to permit the defendant to take or appropriate, for consideration or otherwise, any news received from or gathered for complainant, and from purchasing, receiving, selling, transmitting, or using any news so obtained.

From inducing or procuring, directly or indirectly, any of complainant's members or any of the newspapers represented by them, to violate any of the agreements fixed by the Charter and By-Laws of the complainant.

Does hereby petition for a cross-appeal from said order or decree to the United States Circuit Court of Appeals for the Second Circuit, and prays that its cross-appeal may be allowed, and that a transcript of the record and evidence in said proceeding, duly authenticated, may be transmitted to the said United States Circuit Court of Appeals for the Second Circuit.

Dated, New York, April 13, 1917.

INTERNATIONAL NEWS SERVICE,
By WILLIAM A. DE FORD, *Its Solicitor*,

140 Nassau Street, Borough of Manhattan, New York City.

The foregoing cross appeal is hereby allowed this 13th day of April, 1917 & cost bond waived by consent.

AUGUSTUS N. HAND,
United States District Judge.

A cost bond on the above cross appeal is hereby waived.

STETSON, JENNINGS & RUSSELL,
Solicitors for Complainant.

5

Citation.

By the Honorable Augustus N. Hand, One of the Judges of the District Court of the United States for the Southern District of New York, in the Second Circuit.

To International News Service, Greeting:

You are hereby cited and admonished to be and appear before a United States Circuit Court of Appeals for the Second Circuit, to be holden at the Borough of Manhattan in the City of New York, in the District and Circuit above named, on the 12th day of May, 1917, pursuant to an appeal filed in the Clerk's Office of the District Court of the United States for the Southern District of New York, wherein The Associated Press is appellant and you are appellee to show cause, if any *they* be, why the Decree in said appeal mentioned should not be corrected and speedy justice should not be done in that behalf.

Given under my hand at the Borough of Manhattan, in the City of New York, in the District and Circuit above named, this 13th day of April, in the year of our Lord One Thousand Nine Hundred and Seventeen, and of the Independence of the United States the One Hundred and Forty-first.

AUGUSTUS N. HAND,
Judge of the District Court of the United States for the Southern District of New York, in the Second Circuit.

Due service of a copy of the within Citation is hereby admitted this 13th day of April, 1917.

WM. A. DE FORD,
Solicitor for Appellee.

6

Citation.

By the Honorable Augustus N. Hand, One of the Judges of the District Court of the United States for the Southern District of New York, in the Second Circuit.

To The Associated Press, Greeting:

You are hereby cited and admonished to be and appear before a United States Circuit Court of Appeals for the Second Circuit, to be holden at the Borough of Manhattan in the City of New York, in the District and Circuit above named, on the 12th day of May, 1917, pursuant to a cross-appeal filed in the Clerk's Office of the District Court of the United States for the Southern District of New York, wherein International News Service is appellant and you are appellee to show cause, if any *they* be, why the decree in said cross-appeal mentioned should not be corrected and speedy justice should not be done in that behalf.

Given under my hand at the Borough of Manhattan, in the City of New York, in the District and Circuit above named, this 13th day of April, in the year of our Lord One Thousand Nine Hundred and Seventeen, and of the Independence of the United States the One Hundred and Forty-first.

AUGUSTUS N. HAND,
Judge of the District Court of the United States for the Southern District of New York, in the Second Circuit.

Due service of a copy of the within citation is hereby admitted this 13th day of April, 1917.

STETSON, JENNINGS & RUSSELL,
Solicitors for Appellee.

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Order Appealed From.

United States District Court, Southern District of New York.

In Equity.

No. E. 14-59.

THE ASSOCIATED PRESS, Complainant,
against

INTERNATIONAL NEWS SERVICE, Defendant.

This cause having come on to be heard, and after hearing counsel for both parties, and it being established to my satisfaction:—

(1) That the complainant is a co-operative organization engaged in gathering from sources all over the world and distributing to its members and to newspapers represented by them all kinds of information, news and intelligence, telegraphic and otherwise, for publication in the said newspapers; that the defendant is a corporation engaged in a similar business for its own profit and not as a co-operative organization; that the value of the service to each of the parties hereto to its members or customers largely depends upon the requirement that news which it collects shall be transmitted to its members and their newspapers earlier than similar information can be furnished to other competing newspapers, and that such news shall not be furnished to other newspapers than those of its members or customers, as the case may be, who co-operate in the expense of its work; that an essential part of the operation of the

complainant and also of the defendant is that news collected by them shall remain confidential and not be sold or published by any rival news agency until a reasonable opportunity shall be afforded for publication by all of their respective members or customers.

(2) That the by-laws of the complainant to which each of its members agrees upon assuming membership provide that news received through complainant's service shall be published exclusively in the newspapers, language and place specified in the certificate of membership; that members shall permit no other use to be made of it whatever; that no member shall furnish or permit any of its employees or anyone connected with its newspaper to furnish any of said news in advance of publication to any other person, or to furnish even to another member any of such news which the complainant itself is debarred from furnishing to such member, or to conduct its business in such a manner that any of such news may be communicated to anyone else not entitled to receive it, or to furnish or permit anyone else to furnish to anyone outside the membership of the complainant any of the news which the respective member is required by the by-laws to supply to the complainant, which includes the local news of his district.

That the defendant furnishes the news and information collected by it to its customers under an express understanding and agreement with such customers that the same will not be furnished or communicated by them to any other person or persons and that it will remain confidential and secret until it has been regularly published by them in their newspapers.

(3) That the annual cost to the complainant of its news gathering and distribution to its 800 members is very great, being in the year 1915 about \$3,500,000, all of which cost was assessed among the members on a co-operative basis as provided by the By-Laws; and that the annual cost to the defendant of its news gathering and distribution to its 450 customers is very great, amounting to upwards of \$2,000,000.

(4) That defendant has engaged in obtaining and selling to its clients for publication by them complainant's despatches before their publication, and has employed and paid one, B. E. Cushing,

the telegraph editor of the Cleveland News, a paper holding a certificate of membership from the Associated Press, to furnish it, for sale to its clients and publication by them, not only with the local news of the Cleveland district but also with a substantial amount of other and particularly of Foreign news which had come to the said Cleveland News from The Associated Press and over its wire; and that such service by the said B. E. Cushing was in violation of his obligations as an employee of the said Cleveland News and of its obligations as a member of The Associated Press.

(5) That defendant has repeatedly taken news furnished by the complainant to its member representing the New York American by causing the despatches to be taken on its behalf after being received over the Morkrum receiving machine, before publication thereof.

(6) That defendant has taken and sold to its clients for publication by them, complainant's news, taken either from bulletin boards or early editions of newspapers published by complainant's members, either transcribing them bodily or rewriting them, but in either case without original investigation by its own agencies and without expense; and thereby it has enabled its own subscribers to publish the said news despatches in competition with complainant's members.

(7) That complainant has not authorized any of the aforesaid practices and such instances if any, as may have occurred have been contrary to its rules.

(8) That the complainant's rules and the practices authorized by its officers have been to use defendant's published despatches only as rumors and to cause them, if important, to be investigated at the points of origin by complainant's own representatives and at its own expense, and then to distribute to its members such reports as its own investigations shall have justified.

(9) That in the particulars aforesaid defendant has acted unfairly in competition with the complainant.

(10) That in the particulars aforesaid, and each of them, the defendant has greatly injured and is injuring the complainant and its members, and has been, and is, depriving them of the just benefits of their labors and expenditures, and has been and is causing them irreparable damage, for which they are without adequate or substantial relief except by the interposition of this Court by its order of restraint and injunction.

Now, therefore, upon motion of Stetson, Jennings & Russell, Solicitors for complainant, it is

Ordered, that from and after the filing by the complainant of a proper undertaking to be approved by the Court in the sum of one thousand dollars and from and after the time when the said persons shall severally have knowledge of this restraining order, and until the final hearing and determination hereof or the further order of this Court, the defendant, its officers, agents, servants, employees, assigns, successor and successors, and each of them, and all other persons acting for them, or any or either of them, and all persons aiding or abetting them or any of them,

and all persons whosoever, though not named herein, be and hereby are, enjoined and restrained,

(a) From inducing, procuring or permitting any telegraph editors or other employees or agents of the complainant or any of its members or of any newspaper or newspapers owned or represented by them or any of them, or any such members, to communicate to defendant or to permit defendant to take or appropriate, for consideration or otherwise, any news received from or gathered for complainant, and from purchasing, receiving, selling, transmitting, or using any news so obtained.

(b) From inducing or procuring, directly or indirectly, any of complainant's members or any of the newspapers represented by them, to violate any of the agreements fixed by the Charter and By-Laws of the complainant.

And it is further ordered, that the motion of complainant for a preliminary injunction against the copying, receiving, selling transmitting, using or causing to be copied, received, sold, transmitted or used any of the news furnished by complainant from bulletins and editions of newspapers published by any of complainant's members, be, and it hereby is, denied, for the reason that, although the court is satisfied, both on the facts and the law that the said practice is

unlawful and inequitable, and that complainant is entitled
12 to the injunction, upon condition that it submit to a similar injunction in favor of the defendant, which it has offered to do, the legal question is one of first impression and should remain for decision by the Circuit Court of Appeals before an injunction should be granted.

And it is further ordered, that the said denial of temporary injunction in the aforesaid particular is conditional upon the co-operation of the defendant and its counsel with any motion made by the complainant to advance the hearing of any appeal it may take to the Circuit Court of Appeals, and their co-operation in obtaining a speedy disposition of such appeal; and, in the event of a failure of the defendant or its counsel to perform these conditions, the complainant may renew its application for such preliminary injunction.

Dated April 13, 1917.

Enter.

AUGUSTUS N. HAND,
U. S. Judge.

13 United States District Court, Southern District of New York.

In Equity.

No. E. 14-59.

THE ASSOCIATED PRESS, Complainant,

against

INTERNATIONAL NEWS SERVICE, Defendant.

*Order to Show Cause, Bill of Complaint and Supporting Affidavits.
Affidavits in Rebuttal.*

Stetson, Jennings & Russell, Solicitors for Complainant, 15 Broad Street, Borough of Manhattan, City of New York, New York.

Frederic B. Jennings, W. T. Denison, Counsel.

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15 United States District Court, Southern District of New York.

In Equity.

THE ASSOCIATED PRESS, Complainant,

against

INTERNATIONAL NEWS SERVICE, Defendant.

Upon reading the duly verified bill of complaint herein, and upon the annexed affidavits of Melville E. Stone, duly verified the 3rd day of January, 1917, of Fred W. Agnew, duly verified the 28th day of December, 1916, of George H. Eke, duly verified the 3rd day of January, 1917, of E. P. Koukol, duly verified the 3rd day of January, 1917, and of James Finnerty, duly verified the 3rd day of January, 1917,

Now, therefore, upon motion of Stetson, Jennings & Russell, solicitors for complainant, it is

Ordered that the above named defendant or its attorney herein show cause before me, the undersigned, or one of the other Judges of this Court, at Room No. 1 of the United States District Court,

on the twelfth floor of the Woolworth Building, in the Borough of Manhattan, of the City of New York, on the 10th day of January, 1917, at 10:30 o'clock in the forenoon, or as soon thereafter as counsel can be heard, why a temporary injunction should not issue as prayed for in the said bill of complaint, and for such other and further relief as to the Court may seem just and proper. Service of this order and moving papers on or before January 8th, 1917, shall be sufficient.

AUGUSTUS N. HAND.

U. S. Judge.

16 United States District Court, Southern District of New York.

In Equity.

THE ASSOCIATED PRESS, Complainant,

against

INTERNATIONAL NEWS SERVICE, Defendant.

Bill of Complaint.

To the Honorable the Judges of the District Court of the United States for the Southern District of New York:

Your orator, humbly complaining, shows unto your Honors, as follows:

I.

Complainant is a corporation created and organized under the laws of the State of New York, and is a citizen and resident of that state, and of the Southern District thereof.

II.

The defendant is a corporation created and organized under the laws of the State of New Jersey and is a citizen and resident of that state.

III.

The complainant is a co-operative organization and was incorporated in the year 1900 under the Membership Corporations Law of the State of New York, and its members have been and are the proprietors or representatives of numerous newspapers, both evening and morning, published throughout the United States.

17 Ever since its said organization and in accordance with the powers granted by its certificate of incorporation and pursuant to its by-laws duly enacted, it has been and still is engaged in gathering from sources all over the world by means of its own instrumentalities,

by exchange with its said members, and by other appropriate means, any and all kinds of information, news and intelligence, telegraphic or otherwise, for the use and benefit of its members, and distributing the same among its members for publication in the newspapers owned or represented by them under and subject to the provisions of its by-laws.

IV.

The complainant has its own representatives in every important capital and city in the world. It also has reciprocal arrangements with many important news agencies in foreign countries for the interchange of news. It has about 950 members, each owning or representing a daily newspaper in the United States. Each of these members, as required by the by-laws, supplies to the complainant, the local news gathered by the newspapers represented by such member. All news thus collected by the complainant is promptly transmitted by wire or telephone or other appropriate means to its members for publication in their newspapers.

The complainant is thus able to assure to its members the prompt collection and transmission of news from every point on the globe where any event of importance may occur.

In addition to the great cost of collecting the local and foreign news which the complainant thus obtains by interchange with its members and with foreign news agencies the direct expense of gathering the news which it obtains through its own agents and of transmitting the news to its members is very great, having amounted during the year 1915 to more than three millions of dollars.

The cost of obtaining and transmitting such news is equitably divided amongst the members in accordance with the provisions of the by-laws.

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V.

The service of the complainant is of great financial and business importance to its members, for the reason that it is practically impossible for any one of them alone to establish or maintain the machinery requisite for collecting all the news of the world or any substantial part thereof. Aside from the administrative difficulties of such an effort, the financial cost is so great that no newspaper acting alone could sustain it.

This service of world-wide collection of news, which is essential to the conduct of a modern newspaper can be obtained only by some such co-operative administration of the work of collecting and distributing the news and division of the expense or by purchase of the news from one of the existing news agencies which are privately owned and managed for profit.

Aside from the business importance to its members and the newspapers represented by them of its said service the work of complainant, conducted in the co-operative manner in which it is conducted, is of great public importance in that it provides an assurance of accurate and impartial news service to the public of a sort which

a profit-making news agency is not so likely to provide. The newspapers represented in the complainant are of all varieties and shades of political opinion and news policy, and the control of the complainant's news gathering service by co-operation of all these different newspapers insures the absence of any partisan or other distortion of the news or its coloring to represent the views or further the special interests of any individual or group.

VI.

The value of the news service thus furnished by the complainant to its members largely depends upon the promptness of the service and the accuracy and impartiality of the news and also upon the requirement that the news of the day shall be transmitted by the complainant to its members earlier than similar information can be furnished to other competing newspapers and at as low a cost as possible, and that such news or information collected
19 by the complainant shall not be furnished to other newspapers which are not represented by members of the Associated Press and do not contribute to the expense of gathering such news.

An essential part of the plan of operation of the complainant accordingly is that news collected by it shall remain confidential and secret until its publication has been fully accomplished by all of complainant's members, because otherwise competing newspapers, which bear no part of the cost, would unfairly and inequitably receive the benefit of the service, and such a result would ultimately greatly impair the usefulness of the Association to its members and imperil its very existence.

Accordingly the by-laws of complainant, to which each of its members agrees upon assuming membership, provide that news received through complainant's service is received exclusively for the purpose of publication in the specific newspaper, language and place specified in the member's certificate, and that the members shall permit no other use to be made of it whatever; and also that no member shall furnish or permit any one in his employ or connected with the newspaper specified in the said certificate, to furnish any of complainant's news in advance of publication to any person who is not a member, or to furnish even to another member any news received from complainant which the complainant itself is debarred from furnishing to such member; or to conduct his business in such a manner that the news furnished by the complainant may be communicated to any person, firm, corporation or association not entitled to receive the same; or to furnish, or permit anyone else to furnish, to anyone outside the membership of the complainant any of the news which he is required by the by-laws to supply to the complainant.

VII.

There exist in the United States other news agencies which are operated for profit and to a greater or less extent compete with the

complainant and are constantly endeavoring to induce the members of the complainant to withdraw from membership and purchase the service of such competing news agencies.

20 There are also in the United States many newspapers which are not represented by membership in the complainant but purchase their news service from such competing news agencies and such newspapers are in competition with the newspapers owned or represented by the members of The Associated Press.

It is of great importance to the complainant and its members that it shall have as large and widely distributed a membership as possible because, under its by-laws, it is entitled to receive the local news gathered by such members and also because the cost of maintaining its service is distributed among all its members; any practice, therefore, which impairs the efficiency or exclusiveness or economy, compared with other news agencies or newspapers, of its service has a direct tendency to injure or destroy its usefulness to its members and must inevitably result in the loss of members and direct damage to the complainant and its remaining members.

VIII.

The defendant was organized in the year 1909, under an Act of the State of New Jersey entitled "An Act concerning corporations, Revision of 1896," and in 1913 it was merged and consolidated with another New Jersey corporation known as the National News Association, and as such consolidated corporation, retaining its own original name, it has ever since continued to carry on its business.

This business chiefly consists of the gathering and selling of news to its customers and clients, which consist of newspapers throughout the United States, under contract by which such newspapers undertake to pay at stated times the amounts therein specified for the said service.

IX.

Ever since the organization of the defendant, it has constantly and continuously engaged in the practice of obtaining unlawfully, and in some cases corruptly, and without any substantial expense to itself the news which The Associated Press has gathered at very large expense for the use of its members and appropriating the said news, and in return for the payments above mentioned, 21 selling and transmitting such news to its own clients as if the same had been gathered by its own independent efforts and at great expense and from its own original sources of information and in frequent cases the clients of the defendant have thus been able to publish such news simultaneously with or prior to its publication by the members of the complainant.

This practice the defendant has pursued and is still pursuing by numerous methods including the following:

(a) It has arranged with telegraph editors and other employees of newspapers owned or represented by members of complainant, by which for consideration regularly paid they have communicated to it news received by them from complainant as soon as the same was received and before its publication by complainant's members.

(b) It has made improper and unconscionable use of the memberships held in the complainant by representatives of The New York American, the San Francisco Examiner, and the Los Angeles Examiner, and has unlawfully and wrongfully induced these members of the complainant to violate the by-laws of the complainant and the agreement created thereby, by which their membership in the complainant is controlled, and to disregard the secret and confidential character of the news transmitted to them by the complainant, in that they permit representatives of the defendant to copy news immediately upon its receipt from the complainant and to sell and transmit the same to defendant's clients and customers prior — its publication by complainant's members.

(c) It has copied the news furnished by complainant to its members from early bulletins and early editions of newspapers published by complainant's members and sold and transmitted the same systematically to its customers and clients throughout the United States, and so, by availing itself of the difference in time between the more easterly cities and those further west, and the uncertainties and irregularities in telegraphic transmission, it has, as a common and continuous practice, been able to supply its clients with the said news in many cases simultaneously with or prior to its publication by complainant's members.

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X.

As the complainant is informed and believes, the above practices have occurred especially in the cities of New York, Detroit, San Francisco, Los Angeles and Cleveland, which have been used especially as points for tapping and pirating complainant's news and distributing it to defendant's clients and customers throughout the country.

XI.

Ever since the organization of defendant, the said news, belonging as aforesaid to the complainant, and obtained by the defendant by the said methods, has been systematically, constantly and continuously, and still is unlawfully appropriated by the defendant and sold and transmitted to its said customers and clients as its own and under the pretense and false representation that it was obtained by the defendant from its own original and independent sources; and for this said news the defendant has collected compensation from its said clients and customers as aforesaid.

XII.

The aforesaid practices have been particularly flagrant and injurious to the complainant during the latter part of the past year,

owing to the fact that a large amount of news relating to the European war of the greatest importance and of intense interest to the newspaper reading public, has been unavailable to the defendant through its former channels. In the months of October and November, 1916, the British, French, Canadian, Portuguese and Japanese Governments have each, one after another, prohibited the defendant from securing any news in their several countries and from using any of the cable or telegraph lines running therefrom.

To meet these prohibitions, the defendant has extended and enlarged its application of the above mentioned methods and has thereby taken and appropriated the news obtained from the countries by the complainant, and sold it as aforesaid under the pretense and false representation of having collected it and received it by cable from the country of its origin.

In doing this defendant has systematically pirated and is still systematically pirating news collected by the complainant from all over the world through its own representatives and also through exchange with foreign news agencies and with its own members as hereinbefore alleged.

XIII.

Competition has to some extent existed between the complainant and the defendant, in respect to speed in the collection of news, promptness in its distribution, secrecy prior to publication and cheapness of the service.

Furthermore, defendant's clients or customers, while including some newspapers, representatives of which are members of complainant, are chiefly newspapers which are not represented in complainant's said membership, and, therefore, any appropriation and distribution by the defendant of news collected by the complainant not only reduces the value of the complainant to its own members and endangers its existence, but it enables the defendant to obtain fees from its clients without cost or legitimate effort, and such clients to obtain complainant's services without contributing to the expense or cost thereof.

XIV.

By the aforesaid acts of the defendant, the complainant and its members have been, and are being, greatly injured. They have been, and are being, deprived of the just benefits of their labors and expenditure; and the complainant has been further prejudiced by dissatisfaction among its members due to the fact that the defendant, through a profit-making corporation, has thus been able to provide news at less cost than the complainant, which is a purely co-operative non-profit-making corporation.

Complainant is advised and believes that defendant intends to continue the aforesaid practices and will do so unless restrained.

Such future continuance will increasingly cause the aforesaid reparable damage to complainant, in a degree especially injurious to the existing world crisis. Day by day, and indeed minute by minute, events are occurring and will continue to occur of profound public importance and of the greatest news value. Unless restrained, the defendant will continue to pirate the news of these events by the aforesaid means, and so deprive the complainant and its members and the newspapers represented by them of their labor and expenditures as aforesaid.

XVI.

Complainant is without adequate or substantial relief in the premises, except by the interposition of this Honorable Court by its order of injunction, enjoining and restraining defendant, and all of its officers, agents and employees, from committing or aiding in, devising or encouraging the commission of any of the acts hereinbefore complained of.

Wherefore, complainant prays:

(1)

That the defendant answer the several matters and things hereinbefore set forth as fully and particularly as if the same were herein again repeated and it were particularly interrogated in respect hereto, and

(2)

That a writ of injunction may be issued out of and under the seal of this court to be directed to the defendant and its officers, agents, servants, employees, assigns, successor and successors, and all others acting for it or any or either of them, and all persons aiding or abetting them or any of them, and all persons whomsoever, to restrain them perpetually from and after the time when they severally have knowledge of the existence of the said writ.

(a) From inducing or procuring any telegraph editors or other employees or agents of any of the complainant's members or of any newspaper or newspapers owned or represented by them or any of them, or any such members or newspapers, to communicate to defendant or to permit defendant to take or appropriate, for consideration or otherwise, any news received from complainant, and from purchasing, receiving, selling, transmitting, or using any such news.

(b) From purchasing, obtaining, or receiving, or causing to be purchased, obtained or received for it by anyone, directly or indirectly, any of the news furnished by the complainant to its members and from selling, transmitting, distributing or using the said news.

(c) From copying, receiving, selling, transmitting, using or causing to be copied, received, sold, transmitted or used, the news fur-

nished by complainant, from bulletins issued by the complainant or any of its members or from editions of newspapers published by any of complainant's members.

(d) From inducing or procuring, directly or indirectly, any of complainant's members, or any of the newspapers represented by them, to violate the agreements fixed by the charter and by-laws of the complainant, by which their membership and representation are controlled.

(e) From competing with complainant or aiding or abetting the defendant's clients and customers in competing with complainant's members, by the unfair or corrupt methods hereinbefore alleged or by any other unfair or corrupt methods.

(3)

That a temporary injunction may issue to the same effect pending the final determination of the issues herein.

(4)

That the complainant may have such other and further relief in the premises as the nature of the case may require.

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(5)

That a writ or writs of subpoena directed to the defendant may issue, commanding the defendant at a certain day and under a certain penalty to be therein provided, personally to be and appear before this Honorable Court, and then and there full, true, and direct answer make to this bill of complaint (but not under oath, answer under oath being hereby waived); and, further stand to, perform and abide by such further orders, directions and decrees herein as your Honors shall deem fit.

And your orator will ever pray.

By STETSON, JENNINGS & RUSSELL,

Its Solicitors.

FREDERIC B. JENNINGS,

W. T. DENISON,

Counsel.

STATE OF NEW YORK,

County of New York, ss:

Melville E. Stone, being duly sworn, deposes and says that he is the Secretary and General Manager of The Associated Press, complainant above named; that he has read the foregoing bill of complaint and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated to be

alleged upon information and belief, and that as to those matters he believes it to be true.

MELVILLE E. STONE.

Sworn to before me, this 4th day of January, 1917.

[NOTARIAL SEAL.]

EDWARD U. ROTH,

Notary Public, New York County, No. 159.

27 United States District Court, Southern District of New York.

THE ASSOCIATED PRESS, Complainant,

against

INTERNATIONAL NEWS SERVICE, Defendant.

STATE OF NEW YORK.

City and County of New York, ss:

Melville E. Stone, being duly sworn, deposes and says that he resides in the City of New York, and is and has been since its organization Secretary and General Manager of The Associated Press, the complainant in the above entitled suit. That The Associated Press is a co-operative organization and was organized in 1900 under the Membership Corporations Law of the State of New York, as its certificate of incorporation and by-laws state, for the following purposes: "To gather, obtain and procure by its own instrumentality, by exchange with its members, and by any other appropriate means, any and all kinds of information and intelligence, telegraphic or otherwise, for the use and benefit of its members, and to furnish and supply the same to its members for publication in the newspapers owned or represented by them, under and subject to such regulations, conditions and limitations as may be prescribed by the by-laws."

That the said Associated Press has built up, at great cost to its members, a comprehensive and efficient system of covering the world for news; that within this country it has developed this system by the exchange of news with its members and by the establishment of many offices of its own, with accredited correspondents by day and night, in every city; that abroad it has developed
28 this system by the establishment of staffs in the important capitals, by alliances with other news agencies in many countries, and by the daily transmission via telegraph and cable lines, at great expense, of such news from those countries as its representatives abroad believe will interest its members here.

That these representatives gather and transmit a vast daily budget of information, at large cost, respecting events in every land. The calamitous destruction on the Island of Martinique by the eruption of Mount Pelee was reported by The Associated Press at a cost of thirty thousand dollars. Since the present European war was started The Associated Press alone has at enormous cost, transmitted to this country daily the full official reports of all the belligerent gov-

ernments. On the occasion of the Austro-Hungarian reply to this government's Ancona note, the full reply was transmitted by telegraph from Vienna to Berlin, relayed at Berlin to The Hague, relayed at The Hague to London, and relayed at London to New York. In order to be certain of its transmission it was also sent by telegraph from Berlin to Nauen, from Nauen by wireless to Sayville, and by telegraph from Sayville to New York. This made the cost of transmission to The Associated Press more than one dollar a word. Such an instance is not exceptional.

For all its cable despatches from Tokio and Peking, where The Associated Press maintains its bureaus and its staffs, the transmission cost is more than forty cents a word. Moreover, these bureaus are maintained at these far distant points year in and year out with sometimes only an occasional message coming from them, but this message perhaps is of vital importance to an adequate news service. Obviously, the cost of this message is not limited to the cable charges but should include the expense of maintaining the bureau year in and year out.

In the United States The Associated Press has about 950 members each representing a daily newspaper. Each of these newspapers as required by the by-laws of The Associated Press, places at the disposal of The Associated Press the local news it has gathered in its own field and which is then transmitted to its associated and co-operating newspapers throughout the country.

These comprehensive arrangements secure the prompt collection and transmission of news from every point on the globe where human activities have play. Every minute of every day there is ceaseless vigil for news.

In addition to the cost of collecting local and foreign news under the foregoing arrangements with its own members and with news agencies abroad, The Associated Press incurs great expense in the direct gathering of news through its own immediate agents and employees and in the transmission of news to its members. The annual expense to The Associated Press of operating this service is approximately three and a half millions of dollars.

That The Associated Press is a purely co-operative institution, existing for the benefit and protection of its members. It does not sell its news or make any profit from the same, but divides the cost of gathering and distributing the same equitably among its members.

The members of The Associated Press are representatives of leading morning and evening newspapers throughout the United States. The morning papers are those printed at night for delivery in the morning and the evening papers are those printed in the daytime and usually for immediate delivery.

A great many morning and evening papers have various editions which appear as regular and extra issues, and which come out from time to time, printing the news as it arrives, the last edition for the day representing the accumulated service received during the preceding twenty-four hours.

The day service of The Associated Press goes to the afternoon papers for immediate publication during the day and to the morn-

ing papers for publication during the night for circulation to the readers on the succeeding morning.

The night service of The Associated Press goes to the morning papers for publication in various editions throughout the night, and to the afternoon papers for use by them on the succeeding day.

That in the City of New York such service of news to its members is furnished by The Associated Press by bulletins sent by messenger, by telephone, and over telegraph lines leading from the main office of The Associated Press into the offices of such members.

That similar methods are used in the distribution of such news to its members throughout the United States, in many of the important cities The Associated Press having its own office which attends to the distribution of the news of the members located in such cities respectively.

Deponent further says that the value of the service rendered by The Associated Press to its members largely depends upon the promptness of the service and the accuracy and impartiality of the news furnished, and also upon the requirement that the news of the day shall be thus transmitted by The Associated Press to its members earlier than similar information can be furnished to other competing newspapers and that the same news is not furnished to other newspapers which are not represented by members of The Associated Press and which do not contribute to the expense of gathering such news. It is of vital importance to the integrity, usefulness and efficiency of The Associated Press and even to its existence as a co-operative organization that its members shall have the sole use for publication of the budget of news which they, through their association, have been at the cost and expense of gathering, and that such budget may not be appropriated by publishers not represented in The Associated Press, nor contributing to bear its burdens. The by-laws of The Associated Press accordingly provide that each member shall be entitled, upon compliance with the provisions of the by-laws, to receive a service of news for the purpose of publication in the newspaper specified in his certificate of membership, and for that purpose only, and that a member shall publish the news of The Associated Press only in the newspaper, language and place specified in his certificate of membership, and shall not permit any other use made of the news furnished by the corporation to him or to the newspaper which he represents. And also that no member shall furnish or permit anyone in his employ or connected with the newspaper specified in his certificate of membership to furnish to any person who is not a member, news of the corporation in advance of publication, or conduct his business in such a manner that the news furnished by the corporation may be communicated to any person, firm, corporation or association not entitled to receive the same, and also that no member shall furnish or permit anyone to furnish to anyone not a member of this corporation, the news which he is required by the by-laws to supply to this corporation alone.

This deponent further says that, as he is informed and believes, the defendant, the International News Service, is a corporation duly

organized under the laws of the State of New Jersey, pursuant to the provisions of the act of the Legislature of said State entitled "An Act concerning corporations, Revision of 1896," and that the certificate of said corporation was duly filed in the office of the Secretary of State of the State of New Jersey on December 4, 1909; that by agreement dated February 25, 1913, duly filed in the office of said Secretary of State March 31, 1913, said corporation was merged and consolidated with a corporation of the State of New Jersey known as the National News Association, and that the said consolidated corporation, known as International News Service, has ever since continued to carry on the business of the said corporation. That the agreement of consolidation provides that the said consolidated corporation, in addition to other powers, shall have the right to carry on the business of gathering and distributing for compensation news and artistic and literary material for publication heretofore carried on by the merging corporations. That since its organization, the International News Service has been engaged in the business of gathering and selling news to its customers and clients, which consist of newspapers throughout the United States, under contracts by which such newspapers undertake to pay at stated intervals the amounts therein specified for the service of news so furnished. That the customers who thus purchase news from the International News Service largely consist of newspapers throughout the United States which are not represented by membership in The Associated Press, although some members of The Associated Press also purchase such service from the defendant.

That there is a measure of rivalry and competition between the complainant and the defendant and between newspapers represented by membership in The Associated Press and newspapers not so represented. That it is naturally desired by publishers to get the best possible budget of news at the lowest possible cost.

That from time to time complaint has been made to The Associated Press by its members that publishers of newspapers not members of the Association were publishing in their newspapers the news which had been gathered by The Associated Press and that such non-members were getting this news at a less cost than that to member publishers in the same locality.

Complainant has made careful investigation of the matter and has found the complaint in many cases to be well founded, due to the fact that the defendant, a profit-making corporation, by corruption of employees of members and by other wrongful and illegal methods, has in many cases obtained the news gathered by the complainant and sold it to its clients at a cost less than that to the members of The Associated Press, which the defendant was able to do because its cost of corruptly and otherwise illegally and wrongfully getting the complainant's budget of news was trifling in comparison with the cost to complainant of gathering the same from the various fields in which the separated events occurred.

As a result of this practice a number of the members of The Associated Press, finding that they could get the news at less than their equitable proportion of the cost of gathering the same, have quit

The Associated Press and are now buying the news reports of the defendant.

That as deponent is informed and believes the defendant gets the news which makes up the daily reports, and especially important foreign news, in large part by bribing and corrupting employees of members of The Associated Press inducing them by such bribery and corruption to secretly and furtively furnish to the defendant the current news of the day as supplied by The Associated Press to its members. This has been done, as deponent is informed and believes, in the City of New York, in Detroit, San Francisco, Los Angeles and Cleveland, and no doubt elsewhere; but for some time, as deponent believes, the principal and most flagrant case of such corrupt arrangement, and the principal source of such leakage of news, has been through an arrangement between the Cleveland office of the International News Service and employees of the Cleveland News which receives the service of The Associated Press. For a considerable time heretofore the Cleveland office of the International News Service has had and it still has, an arrangement

33 with the telegraph editors of the Cleveland News by which for a consideration regularly paid, such telegraph editors have telephoned or otherwise communicated to such Cleveland office of the defendant important news received by the Cleveland News from The Associated Press promptly as the same was received. This has been done under an arrangement clearly shown by the following letter dated November 21, 1916, from Barry Faris, the day manager of the International News Service in the City of New York, to F. H. Ward, manager of the Cleveland Office of the International News Service, viz:

Cable Address: Hearstite.

Copy.

International News Service,

238 William Street,

New York.

Kindly address all communications to International News Service.

November 21, 1916.

Mr. F. H. Ward, 720 The Arcade, Cleveland, O.

DEAR MR. WARD: Agnew had an arrangement somewhere in the Cleveland office whereby he could tip us off on big news stories that the A. P. was carrying. I wish you would find out from him just what this connection was and if you cannot make use of it. It proves very valuable to receive a tip what the A. P. is carrying as soon as it puts it out on the wire. Don't mention the A. P. in any

messages of that kind but simply say: "Ansonia carrying fifty dead Pennsylvania wreck Pittsburgh," or whatever it may be.

I like the way you are taking hold of Cleveland very much. I notice a big improvement in the way the stories are written. Keep it up.

With best regards, I am,

Sincerely yours,

(Signed)

BARRY FARIS.

B. F. (M. O.)

34 It appears from the affidavit of F. W. Agnew, submitted herewith, that this arrangement has continued at least from January 17, 1914, to the present time, and under it important news gathered by The Associated Press at heavy cost has been appropriated by defendant and sold by it at a great profit to its clients and customers throughout the United States, and has been so sold and distributed by defendant as if properly gathered by itself from the original sources of information, with all the labor and expense involved, when in fact the same was obtained at the trifling cost of ten dollars per week paid to employees of the Cleveland News for betraying the interests of their employer and of The Associated Press, whose reports thus appropriated were sent to the Cleveland News under seal of confidence and under the obligation to use it only for publication in its own columns.

The New York American is a morning newspaper, published in New York City, and is represented by membership in The Associated Press. News furnished by The Associated Press to The New York American is sent in part by a printing telegraph process which runs into the office of the New York American, and although such service is confidential, and under the by-laws the member representing the New York American has no right to permit such news to be delivered to unauthorized persons, it has been customary, this deponent is informed and believes, for representatives of the International News Service to copy regularly from the report as received in the office of the New York American such news as it has thus obtained from The Associated Press, and to sell and transmit the same to its clients or customers.

In addition to this system of piracy, the defendant has also obtained news furnished by The Associated Press to its members, from early bulletins and editions of newspapers represented by membership in The Associated Press, and has sold and transmitted such news to its clients throughout the United States as if the same had been gathered by its own efforts, at great expense and from original sources of information.

Not only has the International News Service been engaged, by surreptitious and corrupt means, in securing the news of The Associated Press in advance of publication, but upon the appearance of an edition of an afternoon or morning paper of The Associated Press, it has been its practice as deponent is informed and believes to take from such edition such news as was available

and send it out to its clients as its own news, either textually following the despatches of The Associated Press or rephrasing them.

Thus, despatches received during a given day or during the early hours of the succeeding night, as deponent is informed and believes, have systematically been, and are sent to the clients of the International News Service for immediate publication in their newspapers. Such newspapers are in direct competition with The Associated Press newspapers, and thus are able to print much of the news simultaneously with the newspapers of The Associated Press.

By reason of the rapidity of telegraphic transmission, it frequently happens that these papers are able to publish the news of The Associated Press before it is possible for The Associated Press to deliver it to its own members. Telegraphic communication frequently is interrupted by storms or other causes. In such cases it is possible for the International News Service to send Associated Press despatches, taken from the editions of Eastern papers, on their wires, if such wires are not interrupted, and those of The Associated Press are, and not infrequently these despatches are printed in the papers of their clients before it is possible for The Associated Press papers to use them.

Again, as the news despatches are being transmitted continuously and are sent out to the papers upon their receipt, it often happens that an editor sending service in a given order over The Associated Press wires will be forced to delay a comparatively unimportant despatch, while meantime this relatively unimportant despatch has been published in some edition of an Eastern paper, and, the order of transmission being different, has gone to the client of the International News Service in some other city, and has been printed before it has reached The Associated Press in the same city.

Such is the situation in respect to the newspapers served by direct telegraph wires. But a majority of the members of The Associated Press are supplied with their news service by despatches or
36 telephone messages in limited measure and sent from numerous relay offices at fixed hours. In these cases, it is even more difficult to prevent the pirated telegrams from reaching their destination before or simultaneously with those of The Associated Press.

Thus for the reasons already stated and also on account of the difference in time between New York and the cities farther west, the defendant can copy the despatches of The Associated Press from bulletin boards or early editions of the newspapers represented by membership in The Associated Press, and transmit the same to its clients throughout the west in time to be published in their current newspapers; and as deponent believes, this has been a common and continuous practice on the part of the defendant, and the defendant has thus been able, without substantial expense or cost to itself, to obtain and sell to its clients at a large profit news which The Associated Press has obtained for its members at very great cost.

That the news thus obtained from The Associated Press by the defendant has been sold to its clients as its own, and as if obtained from original independent sources, and has been credited in the newspapers of such clients to the International News Service.

These practices, as deponent is informed and believes, have been constant and continuous ever since the organization of the defendant, but they have been particularly flagrant and noticeable during the latter part of the present year, since the International News Service has been cut off in large measure from obtaining foreign news.

As deponent is informed and believes, on October 10, 1916, the International News Service was forbidden by an Act of the British Government from securing any news in Great Britain, or from using any of the cable lines running from Great Britain. On November 8, 1916, a like prohibition was established in France. On or about November 11, 1916, a similar prohibition was established in Canada and on or about November 17, 1916, a similar prohibition was established in Portugal and Japan. From and after these dates it was not possible for the International News Service to obtain or receive news by tele-

graph or cable from any of the countries indicated, and yet
 37 day by day it has regularly sent out news to its clients as if received from these countries by the cables connecting them with the United States. As deponent believes it has taken the news of The Associated Press wherever and however it could get it, regardless of means and of the rights of The Associated Press, and has sent it out, in some cases with slight verbal alterations, in many cases verbatim, as if it had obtained the same independently from its own sources of information abroad. The following are examples of the instances in which this has occurred.

(1) The following bulletin received by The Associated Press from London was sent out to its members at 10:40 p. m. on November 28th, to wit:

"London, November 28 — 1:29 a. m.

"Another air raid on the northeastern coast of England took place last night, the official statement says. Hostile airships crossed the northeastern coast Monday night. Bombs, it is reported, have been dropped in several places in northern counties but no reports of casualties or damage have yet been received."

On November 28, the Washington Herald, a morning newspaper, client of the defendant, and not represented in The Associated Press, published the following despatch:

"By the International News Service.

"London, November 27.

"Zeppelins last (Monday) night again raided the northeastern coast of England. Bombs were dropped. An official statement made public early this morning says no reports have yet been received of casualties or damage. The statement says hostile airships crossed the northeastern coast Monday night. Bombs, it is reported, have been dropped in several places in the northeastern counties but no reports of casualties or damage have yet been received."

And a similar statement was also published in the Rochester Herald (also a morning newspaper) on November 28, which is also a client of the defendant, not represented in The Associated Press. These despatches were clearly copies of the despatches furnished by The Associated Press.

38 (2) On December 5, 1916, The Associated Press sent to its members at 11:52 a. m. a statement of Captain Duffy of the American steamship Chemung, sunk by a submarine off Cape Gata, Spain. The statement was secured by orders from the New York office of The Associated Press, was transmitted by telegraph from Valencia, Spain, to Paris, and from Paris to the New York office of The Associated Press. It contained these words:

"I consider the torpedoing of the Chemung absolutely unjust. We carried a general cargo worth \$2,000,000 and had no contraband whatever."

The New York Evening Journal, a client of the defendant and not represented in The Associated Press, published on December 6th the following statement:

"Captain Duffy of the American steamship Chemung, recently sunk off Cape Gata by an Austrian submarine, made a statement to the American Embassy regarding the sinking of his vessel. The captain made the statement for publication. 'I consider the torpedoing of the Chemung was absolutely unjust. We carried a general cargo worth \$2,000,000 and carried no contraband whatever.'"

Similar statements were published in the Washington Herald and also in the said Rochester Herald on the early morning of December 6th, and in the former it is credited to the International News Service.

(3) On December 6th The Associated Press received the following cable from its London Agents:

"London, December 6,

"12:05 p. m., Wednesday.

"British official apart intermittent enemy shelling Ancere area nothing report night."

The same day The Associated Press sent to its members the following report:

"London, December 6—12:05 p. m.

"Following is the official report of today from the Franco-Belgian front: 'Aside from intermittent enemy shelling in the Ancere area, there was nothing to report last night.'"

39 On the same day, the said New York Evening Journal published the following despatch, which was evidently copied exactly from The Associated Press bulletin to its members:

"London, December 6.

"Aside from intermittent shelling in the Ancre sector of the Somme Front, there is nothing to report, British War Office announced today."

(4) On December 8, The Associated Press sent to its members the following despatch:

"Paris, December 8—1.45 p. m.

"President Poincare has awarded a gold medal to Mrs. Harry Duryea of New York for her services during the last two years as head of the American Aid Committee for War Victims."

The Paris Office of The Associated Press confused the names of two women. The name should have been Mrs. Nina Duryea.

The said Washington Herald on the morning of December 9 published the following despatch:

"Paris, December 8.

"Mrs. Harry Duryea of New York was awarded a gold medal by President Poincare for her services in war relief work. Mrs. Duryea has been president of the American Aid Committee for two years. She returns to America tomorrow."

(5) On the night of Sunday, December 10, The Associated Press sent to its members the official list of the new British ministers. In the list it gave the name of the Secretary for Scotland as Mr. Munro, instead of giving his full name as would have been natural.

In the said Rochester Herald and the said Washington Herald on the morning of December 11 this list was given in the same way, and in the latter paper was credited to the International News Service.

In the same list The Associated Press gave the Lord Chancellor for Ireland as Ignatius J. O'Brien, and some time later sent out a correction that it should have been Sir Ignatius J. O'Brien.

40 In the list given in both the said Rochester Herald and the said Washington Herald the name appeared without the "Sir" as published in the first despatch from The Associated Press.

(6) On December 13, The Associated Press sent out at 7.15, 8.32 and 9.31 a. m. various despatches summarizing the French press comment on the German offer of peace. These were translated in the Paris office of The Associated Press, and were cabled in English.

The Atlanta Georgian, a client of the International News Service, and not represented in The Associated Press, that evening published a similar summary, using many of the identical quotations, which was clearly taken from The Associated Press despatch, and was credited to the International News Service.

(7) On the same day, at 8.47 a. m. The Associated Press sent to its members a despatch received from Amsterdam via London, giving Emperor Charles' statement to his army and navy.

The said Atlanta Georgian the same evening gave this despatch entire, and in precisely the same form, under a London date, credited to the International News Service.

(8) The same day at 8.48 a. m. The Associated Press sent to its members a Tokio despatch saying that the peace proposal of Germany had caused such a violent slump in the Stock Exchange that the market had been temporarily closed.

The said Atlanta Georgian, on the same evening, gave the same news, crediting it to the International News Service.

(9) On the same day, at 12.38 p. m., The Associated Press sent to its members a London despatch containing an extract from the editorial in the London Globe.

The said Atlanta Georgian that evening included one sentence of this extract verbatim in its London story, credited to the International News Service.

(10) On December 14, shortly after 1 p. m., The Associated Press began sending a summary of the speech in the House of Commons by Chancellor Bonar Law.

On the same day the said Atlanta Georgian published several extracts from alleged London despatches, which were evidently taken from the report of The Associated Press.

These examples are illustrative and simply typical of the defendant's current misappropriation of the complainant's news.

Similar misappropriations will, as deponent verily believes, be made until defendant is enjoined, and it is of the greatest importance to the complainant, in order to save it and its members from irreparable loss, that defendant be enjoined forthwith.

Especially at this time, when the affairs of the world are at an epochal crisis and events of the greatest public importance and of incalculable news value are happening, every hour of the day, it is essential to the complainant that its rights as aforesaid should be protected against the unjust, unconscionable, and corrupt piracies of the defendant.

As appears, for instance, from the above examples, at least four items (numbers 6-9 inclusive) of the greatest news value, were pirated by the defendant on a single day (December 13th last), and nine of these examples occurred between December 5th and December 14th, a period of only ten days.

As the deponent is advised, nothing but the interposition of an immediate injunction can prevent similar piracies in the immediate ensuing days, to the irreparable loss of the complainant.

MELVILLE E. STONE.

Sworn to before me this 3rd day of January, 1917.

[SEAL.]

EDWARD U. ROTH,

Notary Public, No. 159, New York County.

42 United States District Court, Southern District of New York.

THE ASSOCIATED PRESS, Plaintiff,

against

INTERNATIONAL NEWS SERVICE, Defendant.

STATE OF OHIO,

County of Cuyahoga, ss:

Fred. W. Agnew, being duly sworn, deposes and says that he is and has been since Jan. 17, 1914, in the employ of International News Service at Cleveland, Ohio. That from that time to about January, 1915, he was in the position of telegraph operator; from about Jan., 1915, to November 20, 1916, he was manager of the Bureau of the International News Service at Cleveland; and since that time has acted as telegraph operator in their employ at Cleveland.

That, as deponent is informed and believes, the Cleveland News receives the service of The Associated Press, Daniel R. Hanna, president of the Cleveland Company, the owner of said newspaper, being a member of The Associated Press representing said newspaper. That the by-laws of The Associated Press expressly provide that its news service shall be furnished only to the members thereof and the newspapers represented by them, and that a member shall publish the news of The Associated Press only in the newspaper, language and place specified in his certificate of membership, and he shall not permit any other use to be made of the news furnished by the corporation to him or to the newspaper which he represents.

43 That during the entire time that this deponent has been connected with the International News Service, the International News Service has had an arrangement with B. F. Cushing, telegraph editor of the said Cleveland News, by which for a consideration regularly paid to the said Cushing by the International News Service, the said Cushing has delivered to the representative of International News Service at Cleveland information in respect to important items of news which have been received by the Cleveland News from The Associated Press and that during the time between about November 1, 1916 and the present time the said International News Service has had a similar arrangement with T. J. Thomas, the assistant telegraph editor of the said Cleveland News. That under this arrangement such information has been telephoned by the said Cushing or by the said Thomas to the manager of the International News Service immediately upon the receipt of such dispatches from The Associated Press, and thereupon the manager of the International News Service has written out the same and transmitted it at once by wire to the main office of the International News Service and the same has been sent out over the wires of the International News Service to their clients and customers.

That the following are some of the instances in which such in-

formation was thus transmitted by the telegraph editor of the Cleveland News to the manager of the International News Service in Cleveland, to wit:

At 12.11 a. m., November 22, 1916, The Associated Press sent the following despatch to the Cleveland News:

"Bulletin.

"London, November 22.

"The British hospital ship Britannic has been sunk with the loss of about 80 lives, says a British official statement to-day."

The word "Bulletin" preceding such a despatch indicates in news service parlance that the news is of a particularly important and pressing character.

On November 22, 1916, the Pittsburgh office of the International News Service sent to New York a tip on the sinking of the "Britannia." Immediately afterward the following bulletin 44 was sent on the New York-Chicago wire by the New York office of the International News Service:

"Bulletin.

"London, November 22.

"The allied hospital ship Britannia has been sunk in the Aegean Sea. 50 lives are reported to have been lost." 12.52 p. m.

On receipt of this bulletin by the Cleveland office of the International News Service, the following message was sent to the New York office from Cleveland:

"Apathy calls sunk ship 'Britannic' Ward."

The word "apathy" was the code word used to indicate The Associated Press, and the said Ward who signs the message was the manager of the Cleveland Bureau of the International News Service.

Thereupon the New York office of the International News Service sent the following:

"Follow London.

"New York, November 22.

"A report was received here this afternoon that the hospital ship sunk in the Aegean was the Britannic (O. K.) one of the biggest ships in the world." 1.03 p. m.

On November 22, 1916, at 12.19 p. m. The Associated Press sent a flash, dated Kansas City, as follows:

"Flash.

"Kansas City, November 22.

"Adamson eight-hour law was held unconstitutional here to-day."

A flash is one of the most important telegrams and indicates that the news is of the highest importance, and such a message has precedence over everything.

45 The following flash was received in the New York office of the International News Service, having been sent by the Chicago sending operator of the said Service:

"Flash.

"Kansas City, Adamson law declared constitutional. Injunction dismissed."

Immediately afterward the following message was sent to the New York office of International News Service from its Cleveland office:

"B. F. Apathy Kansas City flash says Adamson law held unconstitutional. Ward."

B. F. is Berry Faris, the day news manager of the International News Service in New York.

Immediately after this a message was sent by the Chicago office of the International News Service, killing the previous flash sent by it. Then the New York office of the International News Service sent a message saying

"Both oppositions say Adamson law unconstitutional."

The words "both oppositions" refer to the Associated Press and also to the United Press, with which International News Service may have had a similar arrangement for surreptitiously obtaining its news.

The Chicago office then sent to International News Service of New York office, and to all points along the line, a story that the Adamson law was unconstitutional.

On November 25, 1916, the Associated Press sent the following despatch to the Cleveland News at 8.04 a. m.:

"Bulletin.

"Boston, November 25.

"The Merchants and Miners Line passenger and freight steamer Powhatan caught fire off Block Island early to-day. In response to her wireless call for assistance the coast guard cutters Acushnet and Gresham started for the scene. A later message said that the

46 crew was getting the fire under control but did not cancel the request for aid. The steamer left Boston yesterday for Baltimore by way of Newport News and Norfolk."

On the same day, at 8.21 a. m. the following was sent to the New York office of International News Service by the Cleveland office."

"B. F. Apathy says Boston date line steamer Powhatan leaving Boston yesterday for Baltimore afire off Block Island. D. R."

D. R. indicates the Cleveland office of the International News Service.

At 8.55 a. m. on the same day, the New York office of the International News Service then sent the following wire to its clients on its New York-Chicago wire:

"Bulletin.

"New York, November 25.

"The Merchants and Miners steamer Powhatan which left Boston yesterday for Baltimore with freight and passengers is afire somewhere off the New England coast according to a wireless message received here to-day."

The New York office of the said International News Service followed this with the following at 9.06 a. m. of the same day:

"Bulletin Sub.

"Boston, November 25.

"The steamer Powhatan bound from this port to Baltimore with a cargo of freight and a large passenger list put into Block Island off the Rhode Island coast to-day with a fire raging in her hold."

On November 28, 1916, at 11 a. m. The Associated Press sent the following to the Cleveland News:

Take in story of the German naval raid on English east coast as follows: "The armed trawler Narzal was on duty off the east
47 coast on the night of November 26th and is missing."

At 12.28 p. m. on the same day the following was sent by the Cleveland office of the International News Service to the New York office:

"English official statement quotes Berlin statement saying small torpedo boats raided east coast, sunk one boat and crew was lost. English statement says the Neptune is missing since raid. Very vague."

At 12.35 p. m. the following bulletin was sent by the New York office of the International News Service on its New York-Chicago wire:

"Bulletin.

"London, November 28.

"German naval forces have raided the eastern coast of England. The attacking squadron was made up of torpedo boats. One of the ships is reported to have been sunk with the loss of its entire crew. The British warship Neptune was reported missing. Among the towns bombarded by the Germans was Lowestoft."

At 12.45 p. m. the New York office of International News Service sent the following message to the Cleveland office:

"D. R. are you sure English statement says 'Neptune,' N. Y.?"

This was immediately followed by the following message:

"Does it show whether sea forces attacked last night, N. Y.?"

The following answer was sent immediately:

"Will know about both questions in ten minutes. D. R."

48 At 12.55 p. m. the following message was sent by the Cleveland office of the International News Service to the New York office:

"B. F. Narzal, not Neptune, attack on night of 26th Ward."

This message was sent after the manager of the International News Service in Cleveland had obtained the information from some one in the employ of the Cleveland News.

At 12.55 p. m. the following correction was sent by the New York office of the International News Service:

"Correction.

"Editors. In London story of German naval raid make fourth sentence read 'The British armed trawler Narval was reported missing' not Neptune as sent. International News Service."

The name of the trawler given as Narzal instead of Narval was a mistake made over the Telephone, which was corrected by the International News Service in New York possibly upon looking the matter up in the British Maritime Register.

On November 28, 1916, the following message was sent by the International News Service of New York to D. R. (indicating the International News Service at Cleveland):

"D. R. Anything on Chemung sunk? B. F." 2.45 p. m.

At 2.50 p. m. the following message was sent by the Cleveland office to the New York office of the International News Service:

"B. F. Chemung Story carried out of London supposed to have been sunk in Mediterranean bound either from or for Genoa. Ward 2.50 p. m."

At 2.51 p. m. November 28 the New York office of the International News Service sent the following on its New York-Chicago wire:

"London, November 28.

"The American Steamer Chemung, 2615 tons, is reported to have been sunk."

49 At 2.52 p. m. the following message was sent by the Cleveland office to the New York office of the International News Service:

"B. F. Apathy says Spanish steamer landed Chemung crew safely at Valencia and that it went down with American flag flying. Ward, 2.52 p. m."

Thereupon the New York office of International News Service sent out the following on its New York-Chicago wire:

"Add Chemung, N. Y.:

"Practically all of the 35 members of the crew were Americans."

"Follow London:

"New York, November 28.

"The steamer Chemung left here on November 8, bound for Italian ports with a general cargo. The vessel was of American registry, owned by the Harby Steamship Co. of New York.

The vessel was last heard of when she put into Azores eight days ago for coal. She carried a crew of 35 men in charge of Captain Duffy.

The Chemung was 325 feet long and was built by the Union Dry Dock Co. of Buffalo. 2.58 p. m."

On December 5th at 12.27 p. m. the following message was sent to D. R., the Cleveland office of International News Service, by the New York office:

"D. R. Has Lloyd George resigned war secretaryship? B. F. N. Y. December 5, 12.27 p. m."

At 12.30 p. m. the following message was sent by the Cleveland office to the New York office of International News Service:

"Ansonia says he has written his resignation but has not been presented. Ward. December 5."

Ansonia was another code word used by International News Service for The Associated Press.

At 12.48 p. m. on the same day the following bulletin lead
50 was sent by the New York office of the International News Service over its New York-Chicago wire:

"Bulletin Lead.

"London, December 5.

"War Secretary Lloyd George was reported in political circles this afternoon to have prepared his resignation although, so far as could be learned, it had not been presented."

The story continues with a rewrite of earlier edition matter.

At 1.10 p. m. the same day the following message was sent by the New York office of International News Service to D. R., its Cleveland office:

"D. R. What Ansonia now say Lloyd George? B. F. 1.10 p. m. December 5."

The following message was sent by the Cleveland Office to the International News Service, New York office, in reply:

"B. F. Nothing new. Watching closely. Ward. 1.13 p. m. December 5."

At 8.37 a. m. December 6, The Associated Press delivered to the Cleveland News the following:

"Bulletin.

"London, December 6—11.50 a. m.

"The Westminster Gazette says that A. Bonar Law declined the invitation of the King to form a cabinet and that presumably David Lloyd George will be called upon."

At 10.15 a. m. of the same day The Associated Press delivered the following bulletin to the Cleveland News:

"London, December 6.

"The King has sent for Mr. Lloyd George."

On December 6, the following message was sent by the Cleveland office to the New York office of the International News Service:

"B. F. Ansonia says rumored Law declined premiership and King has sent for Lloyd George. Ward. 10.38 a. m."

51 At 10.45 a. m. of the same day, the following bulletin lead was sent from the New York office of the International News Service:

"Bulletin Lead.

"London, December 6.

"The premiership of England has been declined by A. Bonar Law, according to a report in official circles to-day. At the same

time it was reported that King George had sent for War Secretary David Lloyd George, presumably to offer post to him. The post of premier was offered to Mr. Law following the resignation of Prime Minister Asquith last night. 10.45 a. m."

The above appeared in precisely the same form in the Newark, Ohio, American-Tribune, a client of the International News Service, and not of The Associated Press, and was credited to the International News Service.

On December 6, at 10.12 a. m. The Associated Press delivered the following message to the Cleveland News:

"London, December 6.

"After receiving Mr. Lloyd George to whom presumably he offered the premiership, King George summoned to the palace several members of the recent cabinet in the hope of solving the crisis."

"Among those who attended were Andrew Bonar Law, Mr. Lloyd George, A. J. Balfour, first lord of the admiralty, and Arthur Henderson, president of the Board of Education, and representative of the labor party."

The wire of the International News Service is not operated between approximately 11.45 a. m. and 12.15 p. m. as the operators are at lunch.

At 12.40 p. m. the following message was sent by the Cleveland office to the New York office of the International News Service:

"B. F. King calls Balfour, Law and Henderson to palace, George still there. Ward. 12.40 p. m. Dec. 6."

52 At 12.46 p. m. the New York office of the International News Service sent out the following over its wires:

"Bulletin insert new lead cabinet London.

"Mr. Lloyd George was still at the palace. The King sent for Mr. Law, A. J. Balfour, first lord of the Admiralty, and Arthur Henderson, minister of pensions. End insert. 12.46 p. m."

The above bulletin appeared in precisely this form in the Newark, Ohio, American-Tribune, and was credited to the International News Service.

At 11.16 a. m. December 11, The Associated Press delivered the following to the Cleveland News:

"Bulletin.

"Peterboro, Ontario, December 11.

"An explosion in the engine room of the Quaker Oats plant here to-day blew down the walls of the building burying and as yet unknown number of the employees in the ruins which caught fire. Twelve have already been rescued and taken to a hospital severely injured."

At 12.20 p. m. on the same day, the Cleveland office of the International News Service sent to its New York office over the New York-Chicago wire the following:

"Bulletin.

"Petersboro, Ont., December 11.

"Twelve persons were badly burned in an explosion in the engine room of the Quaker Oats company factory here to-day and the building was destroyed by fire. It is feared several employees were buried in the ruins."

On December 11, The Associated Press delivered the following to the Cleveland News at 9.22 a. m.:

"Toledo, Ohio, December 11.

"Fire is raging in the heart of the wholesale district here. It broke out at 7 o'clock in the basement of the Paddock Merchandizing Company's three story stone building. The stock valued at \$75,000 and \$60,000 building will be almost total losses. The flames jumped to the Widmaier Harness store adjoining and wiped it out.

"Firemen are now fighting to save the Western Shoe Company separated only by a fire wall from the Paddock building."

On December 11, at 9:50 a. m., the Cleveland office of the International News Service sent to its New York office and to other points on its New York-Chicago wire the following story:

"Bulletin.

"Toledo, December 11.

"Fire which broke out in the heart of 'wholesale row' to-day totally destroyed the three-story building occupied by the Paddock Merchandise company and spread to the Wickmeyer Harness store. Firemen expect to check the flames before more buildings are destroyed."

On December 11, at 10.59 a. m. The Associated Press sent the Cleveland News a substitute on the Toledo fire from which the following is an extract:

"Sub. fire:

"Toledo, Ohio, December 11.

"At least four firemen were buried under debris in the basement of the Paddock Merchandising Company, totally destroyed by fire early this morning."

On December 11, at 11.20 a. m., the Cleveland office of the International News Service sent to its New York office the following message:

At 11:26 a. m. the New York office of the International News Service replied to the Cleveland office as follows:

"D. R. Send lead Toledo fire. B. F. 11:26 a. m."

54 At 12:10 p. m. the Cleveland office of the International News Service sent to its New York office, and other points on its wire, the following:

"Sub Toledo fire bulletin and add:

" Toledo, December 11.

"Four firemen were killed and a loss of \$175,000 was sustained early to-day in a fire which swept 'wholesale row.' The business blocks occupied by the Paddock Merchandising Company and the Wickmeyer Harness store were totally destroyed.

The four firemen were buried under an avalanche of bricks and plaster when two floors of the Paddock building collapsed. They were on the first floor of the structure at the time. A fifth fireman is missing.

The fire was under control at noon. A rescue party composed of police and firemen immediately began searching for the bodies of the firemen. 12:10 p. m."

On December 11, at 9:13 a. m. The Associated Press delivered the following bulletin to the Detroit evening members of The Associated Press:

"Bulletin.

"London, December 11.

"Premier Lloyd George is ill. He was unable to go to Buckingham Palace to-day with members of his cabinet to receive the seals of office from King George."

At 10:30 a. m., December 11, the following message was sent by the Detroit office of the International News Service to its New York office:

"N. Y. Apathy London Lloyd George too sick to go to palace to receive seals of his office from King. B. X. 10:30 A. M. December 11."

B. X. is the office call for Detroit on the International News Service New York-Chicago wire.

55 On receipt of this message, the New York office of the International News Service sent the following story on its New York-Chicago wire at 10:58 A. M.:

"Lead.

"London, December 11.

"Illness to-day prevented Premier Lloyd George from going to Buckingham Palace with the other members of the new cabinet to

receive the seals of office from King George. The new prime minister suffered a chill and his physicians ordered him to remain indoors."

On December 19, 1916, at 2.43 P. M. The Associated Press sent to the Cleveland News the following bulletin:

"Bulletin E. O. S.

"Paris, December 19.

"Premier Briand announced in the senate to-day that the entente allies would send tomorrow a concerted reply making known 'to the Central Powers that it is impossible to take their request for peace seriously.'"

On December 19, at 2.56 P. M., the Cleveland office of the International News Service sent to its New York office the following:

"B. F. Ansonia has:

"Bulletin.

"Paris, December 19.

"Premier Briand to-day announced that the formal reply of the entente allies to Germany's peace proposal will be sent forward tomorrow, and that it will state that Russia, England and France are unable to take Germany's offer seriously.' 2.56 P. M."

At 3.01 p. m. the New York office of the International News Service sent out the following on its New York-Chicago wire:

"Bulletin.

"Paris, December 18.

"Premier Briand to-day announced in the senate that the allied governments will send their formal reply to Germany's peace offer at once, definitely stating that the allied governments cannot seriously consider it. 3.01 p. m."

56 And at 3.05 p. m. the New York office of the International News Service also sent out the following Add on its New York-Chicago wire:

"Add Briand Bulletin, Paris:

"The premier added that Great Britain, France and Russia had reached an agreement to this effect 3.05 p. m."

The Newark (Ohio) American-Tribune repeated the Paris Bulletin in the same words as the message sent out by the New York office of the International News Service, and credited it to the International News Service.

On December 20, at 10.56 a. m. The Associated Press sent to the Cleveland News the following:

"Birmingham, Ala., Dec. 20.

"Eighty men are entombed in the Edgewater mines of the Tennessee Coal, Iron & Coke Company, twelve miles northwest of Birmingham, as the result of an explosion, believed to have been caused by gas, early to-day. The blast, said to have occurred at the Bottom of the mine, it is believed, was slight and some hope of rescuing the men is entertained.

"An entire force of rescue workers has been rushed to the mine and with a corps of physicians from Birmingham are doing everything possible to reach the men."

On the same day at 11.06 a. m. Frank H. Ward, the manager of the Cleveland office of the International News Service, upon information received from said Cushing in the employ of the Cleveland News, sent out over the wires of the International News Service to its clients the following message:

"Birmingham, Alabama, December 20.

"Eighty miners were buried alive in the Tennessee Coal & Iron Company mine twelve miles from here to-day. Explosive gases caused the roof to cave in. There is some hope of rescuing the men."

57 Thereupon the New York office of the International News Service sent the following reprimand to the said Ward for sending the said message to its clients over its wires instead of to its New York office:

"Ward, Under no circumstances ever put out such bulletin again. We have bureau in Birmingham. Message us only. Do not rewrite anything. B. F. New York, December 21, 11.12 a. m."

Deponent further says that he has personal knowledge of the facts hereinbefore stated; that the despatches hereinbefore quoted sent or received by the Cleveland office of the International News Service were either actually sent or received by him, or the original despatches have been seen by him; that during the time when he was the manager of the Bureau of the International News Service at Cleveland he actually received by telephone such information as

that hereinbefore referred to from the telegraph editor of the Cleveland News, and since he ceased to be such manager he, as telegraph operator of the International News Service, has occupied the same room as Frank H. Ward, who was then the manager of the Cleveland office of the International News Service, and daily heard the said Ward communicating over the telephone with the telegraph editor of the Cleveland News.

And deponent further says that at about 1 p. m. daily the messenger of the International News Service in Cleveland goes to the composing room of the Cleveland News and obtains proof of the Cincinnati Livestock Market, which are delivered by The Associated Press daily to the Cleveland News for its exclusive use.

FRED W. AGNEW.

Sworn to before me this 28th day of December, 1916.

[NOTARIAL SEAL.]

W. J. MAHON,

Notary Public, Cuyahoga County, Ohio.

My commission expires Dec. 2, 1918.

58 THE STATE OF OHIO,

Cuyahoga County, ss:

I, Edmund B. Haserodt, Clerk of the Court of Common Pleas, a Court of Record of Cuyahoga County, aforesaid, do hereby certify that W. J. Mahon before whom the annexed acknowledgment, oath, affidavit, was taken, was at the date thereof a notary public in and for said County, duly authorized by the laws of Ohio to take the same, also to take acknowledgments, affidavits and proofs of deeds or conveyances for land, tenements or hereditaments situated and lying in said State of Ohio, and further that I am well acquainted with his handwriting and believe his signature thereto is genuine, and that the annexed instrument is executed according to the laws of the State of Ohio.

Commission expires December 2, 1918.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court, at Cleveland, this 28 day of Dec. A. D. 1916.

EDMUND B. HASERODT, *Clerk.*

No. 4038.

(Seal Common Pleas Court, Cuyahoga County, Ohio.)

59 United States District Court, Southern District of New York.

THE ASSOCIATED PRESS, Complainant,

against

INTERNATIONAL NEWS SERVICE, Defendant.

STATE OF NEW YORK,

City and County of New York, ss:

George H. Eke, being duly sworn, deposes and says that he resides in the City of New York, and is and has been for the last year and upwards in the employ of The Associated Press; that since June, 1916, his duties have consisted of inspecting the Morkrum printing telegraph machines maintained by The Associated Press in the offices of the morning newspapers in the City of New York published by members of The Associated Press; that the Morkrum apparatus consists of a machine which prints upon sheets of paper the news which is transmitted telegraphically from the central office of The Associated Press into the offices of such newspapers. That an employee of The Associated Press is in constant attendance upon each of such receiving machines, and, as rapidly as the news

is printed, delivers the sheet containing such news to the editor of the morning newspaper in the same room. The deponent has expert knowledge of the operation of said receiving machines, and his business has consisted of inspecting such receiving machines and making such repairs as might be necessary to obviate any defects in their operation. That in the performance of such duties, deponent, since June, 1916, has almost daily gone to the editorial room of the New York American between the hours of 6 p. m. and 1 a. m. for the purpose of inspecting the Morkrum receiving machine, maintained by The Associated Press in such office.

60 That upon such visits he has repeatedly seen one of the editors of the International News Service come into the editorial room of the New York American, go to the desk sometimes of the war editor and sometimes of the telegraph editor of the New York American and read over the sheets containing the news furnished by The Associated Press over the said Morkrum receiving machine, and thereupon make and take away with him notes which deponent assumes consisted of the substance of the information obtained from the said sheets.

And deponent further says that upon many such occasions, a sheet containing an important piece of news, known as a bulletin, has been taken from the Morkrum receiving machine by The Associated Press employee, and handed to one of the editors of the New York American when the editor of the International News Service was present, and he has seen the editor of the New York American read the same sheet, and thereupon engage in conversation with the editor of the International News Service. That after such conversation the editor of the International News Service would leave the room, and deponent has no doubt he thereupon returned to the offices of the International News Service, which were upon the floor below the offices of the New York American.

GEORGE H. EKE.

Sworn to before me this 3rd day of January, 1917.

[SEAL.]

EDMUND U. ROTH,

Notary Public, No. 159, New York County.

61 United States District Court, Southern District of New York.

THE ASSOCIATED PRESS, Complainant,

against

INTERNATIONAL NEWS SERVICE, Defendant.

STATE OF NEW YORK,

City and County of New York, ss:

E. P. Koukol, being duly sworn, deposes and says that he resides in the City of New York, and is and has been for eighteen months or more in the employ of The Associated Press.

That during the latter part of the year 1915 his duties consisted of attending to the Morkrum receiving machine maintained by The Associated Press in the editorial room of the New York American, where he attended one night a week to relieve the regular attendant. That while attending upon such receiving machine, he repeatedly saw Mr. Frank B. Atwood, one of the editors of the International News Service, come into the editorial room of the New York American, go to the war editor's desk, and look over The Associated Press day report, which was delivered by messenger at 6 p. m. Mr. Atwood usually remained about twenty minutes, during which time he took notes on several items. These he took with him when he left the editorial room. He frequently came back to the editorial room of the New York American several times during the night, and upon each visit he looked over the copy received from The Associated Press over the Morkrum receiving machine. On one visit, about 10.15 p. m., while deponent was delivering some copy to the war editor, deponent noticed particularly that Mr. Atwood was looking over the story of the war developments of that day under a London

62 date line, and made extensive notes of this despatch, and must have copied fully three-quarters of it on a pad of yellow paper which Mr. Atwood customarily carried with him.

And deponent further says that for some months he has been engaged in the office of The Associated Press in this city in attending to repairs upon the Morkrum machines in such office, and also upon machines brought in from outside. That he has occasionally gone out to offices of the morning newspapers published by members of The Associated Press, to examine and repair the Morkrum machines in such offices. That on the night of November 21, 1916, he was engaged in repairing the Morkrum machine in the editorial room of the New York American. That at about 11.50 p. m. the news of the death of the Austrian Emperor was received over the Morkrum machine from the office of The Associated Press. The sheet containing such news was immediately delivered to Mr. Dunn, the assistant city editor of the New York American, the telegraph editor not being present. Deponent then heard Mr. Dunn call to an office boy to run down stairs and inform them the Austrian Emperor was dead. That the said message was no doubt sent to the International News Service, as the International News Service occupied the floor below, and is the only occupant of any of the floors below that would be interested in the news, except the German Journal, one of the Hearst newspapers, so-called, which is not represented by membership in The Associated Press and takes the service of the International News Service.

E. P. KOUKOL.

Sworn to before me this 3rd day of January, 1917.

[SEAL.]

EDWARD U. ROTH,
Notary Public No. 159, New York County.

63 United States District Court, Southern District of New York.

THE ASSOCIATED PRESS, Complainant,

against

INTERNATIONAL NEWS SERVICE, Defendant.

STATE OF NEW YORK,

City and County of New York, ss:

James Finnerty, being duly sworn, deposes and says that he resides in the City of New York and is in the employ of The Associated Press. That for about three months he has attended to the Morkrum receiving machine maintained by The Associated Press in the office of the New York American. That he has repeatedly seen one of the employees of the International News Service come into the editorial room of the New York American and make copies of bulletins furnished by The Associated Press to the New York American over the said Morkrum receiving machine. That among other occasions, on the night of December 19th, 1916, he saw a man whom he believed to be one of the editors of the International News Service make a copy of a bulletin sent by The Associated Press over the Morkrum receiving machine to the New York American. That he subsequently asked one of the employees of the International News Service if they had a man answering the description of the man who copied said bulletin, and the boy replied, "Yes, he comes up here to get war tips."

Deponent further says that until about a week and a half ago a Mr. Coates was one of the editors employed by the New York American. That about a week and a half ago as deponent is informed and

64 believes the said Coates left the New York American and was employed by the International News Service. That since the said Coates entered the employ of the International News Service he has every night come into the editorial room of the New York American several times during the night, and examined the sheets containing the news received from The Associated Press over the said Morkrum receiving machine, and made copies or extracts therefrom upon a pad which he has taken away with him.

JAMES FINNERTY.

Sworn to before me this 3rd day of January, 1917.

[SEAL.]

EDWARD U. ROTH,

Notary Public (No. 159), New York County.

65 United States District Court, Southern District of New York.

THE ASSOCIATED PRESS, Complainant,

against

INTERNATIONAL NEWS SERVICE, Defendant.

Supplemental Affidavits in Support of Order to Show Cause.

Stetson, Jennings & Russell, Solicitors for Complainant, 15 Broad Street, Borough of Manhattan, City of New York, New York.

66

Affidavit.

United States District Court, Southern District of New York.

THE ASSOCIATED PRESS, Plaintiff,

against

INTERNATIONAL NEWS SERVICE, Defendant.

B. E. Cushing, being duly sworn, deposes and says: that he is employed by the Cleveland News; that since January 1, 1914, he has acted as telegraph editor of said Cleveland News; that from that time until January 6, 1917, he has had an arrangement with the Cleveland manager of the International News Service by which, for a consideration paid to the deponent by the said International News Service, he has delivered to the representatives of the International News Service at Cleveland information in respect to important items of news; that at the beginning of said arrangement such information was confined to the local news of Cleveland; that as time passed the arrangement was brought to include news which had been received by the Cleveland News from the Associated Press and entrusted to said deponent as said telegraph editor for exclusive publication in the Cleveland News; that said furnishing of such information was at the time to his personal knowledge in violation of the rules and wishes of the management of the Cleveland News; that said arrangement began at the time the International News

Service wire was installed in Cleveland in 1913; that prior thereto he acted as correspondent for the Chicago American and filed despatches covering local news directly to the Chicago American; that upon establishing the office of the International News Service in Cleveland, an official of the International News service at Chicago approached deponent and told him that thereafter he could file such news as was expected of him on the wire of the International News Service at its Cleveland office; that during the incumbency of Roy Moore as representative of the International News Service at Cleveland he turned over such news to said Moore for transmission over the International News Service

wire; that from about January, 1915, when said Moore was succeeded by one Fred W. Agnew, deponent continued filing such news with said Agnew until November, 1916; that upon said Agnew being succeeded as manager of the International News Service at Cleveland by one Frank H. Ward, deponent continued filing such news with said Ward until January 6, 1917; that in consideration of his services aforementioned deponent has received remuneration directly from the International News Service Chicago or New York offices; that prior to November, 1916, such remuneration varied from a small amount to forty dollars a month, according to the amount of news furnished; that since November, 1916, the remuneration has been definitely fixed at five dollars weekly and has been paid by check and voucher directly from the International News Service at New York, said checks being signed by Fred J. Wilson; that prior to June 1, 1916, the office of the said International News Service in Cleveland was in the same building and on the same floor with the office of the Cleveland News; that prior to June 1, 1916, communications between deponent and the employees of the International News Service was either directly or by telephone; that since June 1, 1916, the Cleveland office of the said International News Service has been established in a different building from that occupied by the Cleveland News; that since June

68 1, 1916, deponent has had telephonic communication with the said employees of the International News Service in Cleveland whereby such news aforementioned was transmitted; that usually deponent would leave his desk and go to a private telephone booth or some remote part of the Cleveland News office in order to get secret telephonic communication with the International News Service Cleveland office; deponent further says that when he was first engaged by the International News Service he was to furnish the local news of Cleveland; that after the International News Service wire was established in Cleveland he was frequently called on the telephone by said Moore and asked if he had information on certain items of news that were foreign and domestic and not local news of Cleveland; that he would reply that he did have such information and would thereupon impart to said Moore the nature of said news item; that many of said news items thus imparted to the said Moore were furnished to the Cleveland News by the Associated Press; that after said Agnew became Cleveland manager of said International News Service the said Agnew impressed upon deponent the importance of protecting International News Service through the said Agnew on important Associated Press news that had been delivered to the Cleveland News by the Associated Press; that thereupon deponent, agreeable to the representations of said Agnew, did protect the said International News Service through the said Agnew on such Associated Press news by telephone as aforesaid; that deponent has kept no record of the number of telephonic calls made for such purpose, nor of the news thus imparted to the said International News Service by telephone, but that he has read the affidavit of Fred W. Agnew contained in document entitled:

Order to Show Cause.

United States District Court, Southern District of New York.

In Equity.

THE ASSOCIATED PRESS, Complainant,

against

INTERNATIONAL NEWS SERVICE, Defendant.

Bill of complaint and affidavits and beginning at the top of page twenty-eight thereof and ending on page forty-four thereof, and purporting to have been made by said Fred W. Agnew on the 28th day of December, 1916, before W. J. Mahon, Notary Public, Cuyahoga County, Ohio; that he is the party referred to in said affidavit as B. F. Cushing, and that the statements contained in the said affidavit, which refer to him are true to the best of his knowledge and belief;

Deponent further says that he has understood that in thus communicating Associated Press news to the said International News Service he has been violating a rule of the office of the Cleveland News, and that when, in April, 1916, one T. A. Robertson, managing editor of the Cleveland News, asked him if he was furnishing news to said International News Service he replied that he was not, notwithstanding that he was actually at the time so doing; that he was as that time specifically informed that to furnish news to the International News Service was a violation both of the by-laws of the Associated Press and of the orders of the Cleveland News, and was instructed that he should not under any circumstances do so.

B. E. CUSHING.

Sworn to before me and subscribed in my presence this 8th day of January, 1917.

FRANKLIN H. FARASEY,

Notary Public in and for Cuyahoga County, Ohio.

My commission expires Oct. 9th, 1919.

Witness:

KENT COOPER.

United States District Court, Southern District of New York.

THE ASSOCIATED PRESS, Plaintiff,

against

INTERNATIONAL NEWS SERVICE, Defendant.

T. J. Thomas, being duly sworn, deposes and says that he is employed by the Cleveland News; that since November 1, 1916, he has

acted as assistant telegraph editor, and has been in complete charge of the local and telegraph desk after 3 p. m.; that about November 1, 1916, he was approached by Fred W. Agnew, then manager of the International News Service at the Cleveland office, who told him that the International News Service had been beaten on the story of the collapse of the West Third Street Viaduct in Cleveland, Ohio;

71 that the International News Service was without protection on late afternoon news; that said Agnew asked him to furnish to the International News Service telephonic news tips on late afternoon stories; that said Agnew did not designate that these tips were to be confined to the local news, but deponent in his own mind concluded that that was all that said Agnew desired of him, and, in consequence thereof, confined whatever news tips he gave to the International News Service to local happenings; that said Agnew said he was protected earlier in the day; that said Agnew promised to arrange remuneration for this service; that, as a result of this conversation with the said Agnew, he has from time to time telephoned to said Agnew for the International News Service news tips on late afternoon local news stories; that he has received weekly since the beginning of the aforementioned arrangement check and voucher from the International News Service for \$5, said voucher being endorsed "For services," and said check being signed "International News Service, Fred J. Wilson."

Further deponent saith not.

(Signed)

T. J. THOMAS.

Sworn to before me and subscribed in my presence this 8th day of January, 1917.

(Signed)

FRANKLIN H. FARASEY,

Notary Public in and for Cuyahoga County, Ohio.

My commission expires October 9, 1919.

Witness:

(Sgd.) KENT COOPER. [SEAL.]

72 United States District Court, Southern District of New York.

THE ASSOCIATED PRESS, Plaintiff,

against

INTERNATIONAL NEWS SERVICE, Defendant.

STATE OF OHIO,

County of Cuyahoga, ss:

Ollie Jospy, being duly sworn, deposes and says: that she is a telephone operator in the employ of the Cleveland News; that she is acquainted with B. E. Cushing, telegraph editor of the Cleveland News; that she has made telephone connections for said Cushing with the office of the International News Service, such calls being made

from a telephone booth and not from the regular telephone station on Mr. Cushing's desk; that she has observed that he has been particularly impatient to get quick connections; that on one occasion she called the attention of Miss Edna Murfey, manager of the telephone switchboard, to his impatience. Further deponent saith not.

(Signed)

OLLIE JOSPY.

Sworn to before me and subscribed in my presence this 8th day of January, 1917.

(Signed)

FRANKLIN H. FARASEY,

[SEAL.] *Notary Public in and for Cuyahoga County, Ohio.*

My commission expires October 9, 1919.

Witness:

(Sgd.) KENT COOPER.

73 United States District Court, Southern District of New York.

THE ASSOCIATED PRESS, Plaintiff,

against

INTERNATIONAL NEWS SERVICE, Defendant.

STATE OF OHIO,

County of Cuyahoga, ss:

Edna Murfey, being duly sworn, deposes and says that she is and she has been employed by the Cleveland News as manager of the telephone switchboard and exchange since January 1, 1914, and prior thereto; that she is acquainted with B. E. Cushing, telegraph editor of the Cleveland News; that she knows that said Cushing has used the telephone in communicating with the office of the International News Service at Cleveland, O.; that within the last two weeks she has been particularly observant of the fact that he has been anxious to get quick connections with the International News Service; that she has been able to observe this more particularly within the last two weeks because the partition which formerly enclosed the telephone exchange has been removed; that on one occasion her attention was called by operator Ollie Jospy to the fact that he was impatient over a delay in getting a connection; that on most of the occasions when he would call, instead of calling from his regular desk, he would call from a remote corner of the room, or from a booth; the said Cushing has asked for a line without designating the number to be called, in addition to asking for a direct connection with the International News Service office;

74 that these connections have been asked for and made for said Cushing, to her knowledge since about January, 1914; that she is acquainted with T. J. Thomas, assistant telegraph editor of the Cleveland News; that she has observed that on a few

occasions said Thomas has called the office of the International News Service at Cleveland, Ohio, said Thomas making the call direct to the International News Service from his regular desk.

Further said deponent saith not.

(Signed)

EDNA MURFEY.

Sworn to before me and subscribed in my presence this 8th day of January, 1917.

(Signed)

FRANKLIN H. FARASEY,

Notary Public in and for Cuyahoga County, Ohio.

My commission expires Oct. 9, 1919.

Witness:

(Signed) KENT COOPER. [SEAL.]

75 United States District Court, Southern District of New York.

THE ASSOCIATED PRESS, Complainant,

against

INTERNATIONAL NEWS SERVICE, Defendant.

STATE OF NEW YORK,

City and County of New York, ss:

William E. Hall, being duly sworn, deposes and says that he resides in the City of Pittsburgh, Pa., and is in charge of the night office of The Associated Press in that city, and has been so employed for upwards of two years; that from November, 1912, to October, 1914, he was employed by the International News Service, the defendant herein; that from May, 1913, to April, 1914, his services were rendered during the night time in the Chicago office of the defendant, and that his chief work consisted of preparing news despatches to be transmitted to the clients of the International News Service; that a part of such news despatches was daily taken by him from the early editions of the Chicago morning papers, including the Chicago Tribune and the Chicago Herald, which editions were published at various periods during the night from 7 o'clock until midnight; that during the period from April, 1914, to October, 1914, his services were rendered during the daytime in the Chicago office of the defendant, and that his work consisted chiefly of preparing news despatches to be transmitted to the clients of the International News Service, and that a part of said

76 despatches was daily taken by him from the morning newspapers before mentioned and also from various editions of the evening newspapers, including the Chicago Daily News, the Chicago Evening Journal, and the Chicago Evening Post, which were published between the hours of 11 a. m. and 3 p. m.; that all of the newspapers before mentioned were represented by membership in The Associated Press; that the news despatches so taken

by him were the news despatches of The Associated Press, and that in the case of the Chicago Daily News such despatches were expressly stated in its columns to be Associated Press despatches; that the reports of such news which deponent thus prepared were actually transmitted by the International News Service by wire to its clients throughout the United States; that the news reports so prepared by him and transmitted to the clients of the International News Service included the said Associated Press news furnished to the Chicago newspapers above mentioned, and that he transmitted the said news either in the same text in which it appeared in those papers or in a paraphrase of his own; that he was expressly instructed by the International News Service to use such Associated Press matter in making up such news reports for transmission to the clients of the International News Service in order that the newspapers purchasing the reports of the International News Service might be able to receive and publish throughout the country the news thus obtained from The Associated Press as nearly as possible simultaneously with the newspapers published by members of The Associated Press.

WILLIAM E. HALL.

Sworn to before me this 15th day of January, 1917.

[NOTARIAL SEAL.]

WM. H. BRUDER,

Notary Public, Bronx County, No. 35.

Certificate filed in New York County No. 45.

77 United States District Court, Southern District of New York.

THE ASSOCIATED PRESS, Complainant,

against

INTERNATIONAL NEWS SERVICE, Defendant.

Complainant's Affidavits in Rebuttal.

Stetson, Jennings & Russell, Solicitors for Complainant, 15 Broad Street, Borough of Manhattan, City of New York, New York.

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81 I. *Affidavits Replying to Statements Made by Defendant's
Counsel at the Hearing in This Proceeding.*

Affidavit of Melville E. Stone.

United States District Court, Southern District of New York.

In Equity.

No. E. 14-59.

THE ASSOCIATED PRESS, Complainant,

against

INTERNATIONAL NEWS SERVICE, Defendant.

STATE OF NEW YORK,

City and County of New York ss:

Melville E. Stone, being duly sworn, deposes and says that, as appears from the stenographer's minutes of the arguments upon the motion for an injunction in the above entitled cause, Mr. Samuel Untermeyer, the counsel for the defendant, in his argument stated as follows: "Mr. Wise calls my attention to another case bearing upon the action of The Associated Press, which is trying to set up such a high moral standard, the case of the Cleveland Telegraph Company against Mr. Melville Stone, in 105 Federal Reporter, in which the
82 court found that defendants have appropriated and used and are appropriating and using the said quotations before publication thereof, wrongly and contrary to law, and in violation of the complainant's rights." And Judge Kohlsaat said, "I deem the last finding satisfactorily established by the proofs submitted by the complainant, corroborated by the shuffling evasiveness of the affidavits presented by defendants."

That when deponent's attention was called to this statement, he knew at once that he had never been a party to any such suit in the Courts, and that the suit referred to must be against some other man. He at once sent for and examined the report of the case in 105 Federal Reporter, page 794. He found that there was nothing in the report to indicate that the suit in question was against deponent or any man named Melville Stone, as stated by defendant's counsel. That on the contrary the title of the case, as reported, was "Cleveland Telegraph Company against Stone et al." Judge Kohlsaat, who rendered the opinion, was an intimate friend of this deponent, and could not have used in respect to him the language reported in the case and quoted by said counsel. Upon reflection he recalled that about fifteen years ago there was a notorious wire tapper, named Oscar M. Stone, who carried on his operations at Chicago, and in other places in the west, who had been convicted and sentenced to jail, and he concluded that the Stone mentioned as one of the de-

defendants in the said case must be the said Oscar M. Stone. He at once instructed his correspondent in Chicago by wire to apply to the Clerk of the United States District Court there, and also to Henry S. Robbins, the counsel for the plaintiff in the case in question, and has been informed by both that deponent was not a party to said suit, and that the Stone who was the defendant therein was Oscar M. Stone, the notorious wire tapper to whom deponent has referred. Deponent has obtained from the Pinkerton Agency an article in respect to the said Stone, printed in a paper officially used

83 by the Sheriffs, Police Departments and detectives to convey information respecting notorious and dangerous criminals, and attaches hereto a photographic copy of said article. Said article states, among other things, "November 11, 1903, convicted of violating federal injunction restraining him from tapping the wires of Cleveland Telegraph Company, and punishment taken under advisement by Judge Kohlsaat."

Deponent has been the general manager of The Associated Press since its organization in 1900. He has always had a very strong feeling in respect to the importance of preserving the sanctity of news gathered by any news association or newspaper, and as to the injustice and iniquity of pirating or appropriating by any means whatsoever any such news, so long as it had any news value. In his conduct of the Associated Press, he has uniformly and continuously and rigidly set his face against and prohibited and, so far as he knows, has prevented any such practices in such association.

Deponent accordingly feels particularly outraged that a misstatement of a reported case, charging him with such practices, and with the use of "shuffling evasiveness in affidavits presented in support thereof" should have been made in open court. That there is not the slightest foundation for any such statement, and that the counsel was entirely unjustified in assuming, without any verification, that the Stone referred to as one of the defendants in said case was this deponent.

MELVILLE E. STONE.

Sworn to before me this 22nd day of January, 1917.

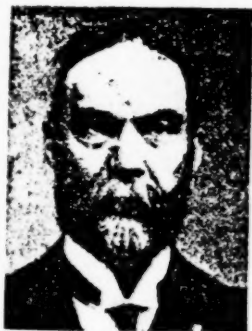
[SEAL.]

EDWARD U. ROTH,

Notary Public (159), *New York County*.

(Here follows reproduction of circular marked page 84.)

Oscar M. Stone, noted wire-tapper, formerly chief operator for the Western Union Telegraph Company at Chicago. Arrested October 27, 1903, by Detective



OSCAR M. STONE.

Clifton R. Wooldridge of Chief O'Neill's private staff, this city, age 47, 5 ft 11 1/2 in., 150 pounds, grey eyes, dark brown hair. Bertillon: 80.8; 87.0; 96.0; 19.3; 13.2; 14.4; 7.6; 23.8; 12.3; 9.6; 49.8.

Convicted of keeping a common gambling house and fake pool-room before Judge Baker, July 2, 1900 and fined heavily. (Criminal Court, Cook County, Illinois.)

May 1898 during Spanish-American war, arrested in company with George J. Hammond, in Indiana. They were caught in the act of tapping the wires of the Western Union Telegraph Company, by a posse of farmers who thought they were Spanish spies. Later found guilty of contempt of court, for violating a Federal injunction, procured by the Western Union Telegraph Company, and sentenced to six months in county jail.

October 27, 1903, arrested in his office,

260 South Clark street, Chicago, and four other offices of his in the same city, were raided at the same time. Ten thousand dollars worth of telegraphic apparatus used for illegitimate purposes, seized.

November 10, 1903, Stone and a confederate, one E. B. Meyers, held to grand jury of Cook county, Illinois, and bail fixed at \$1,000.

Nov. 11, 1903, convicted of violating Federal injunction restraining him from tapping the wires of the Cleveland Telegraph Company and punishment taken under advisement by Judge Kohlsaat.

Strings wires throughout city without franchise; and the same are used principally for furnishing information to



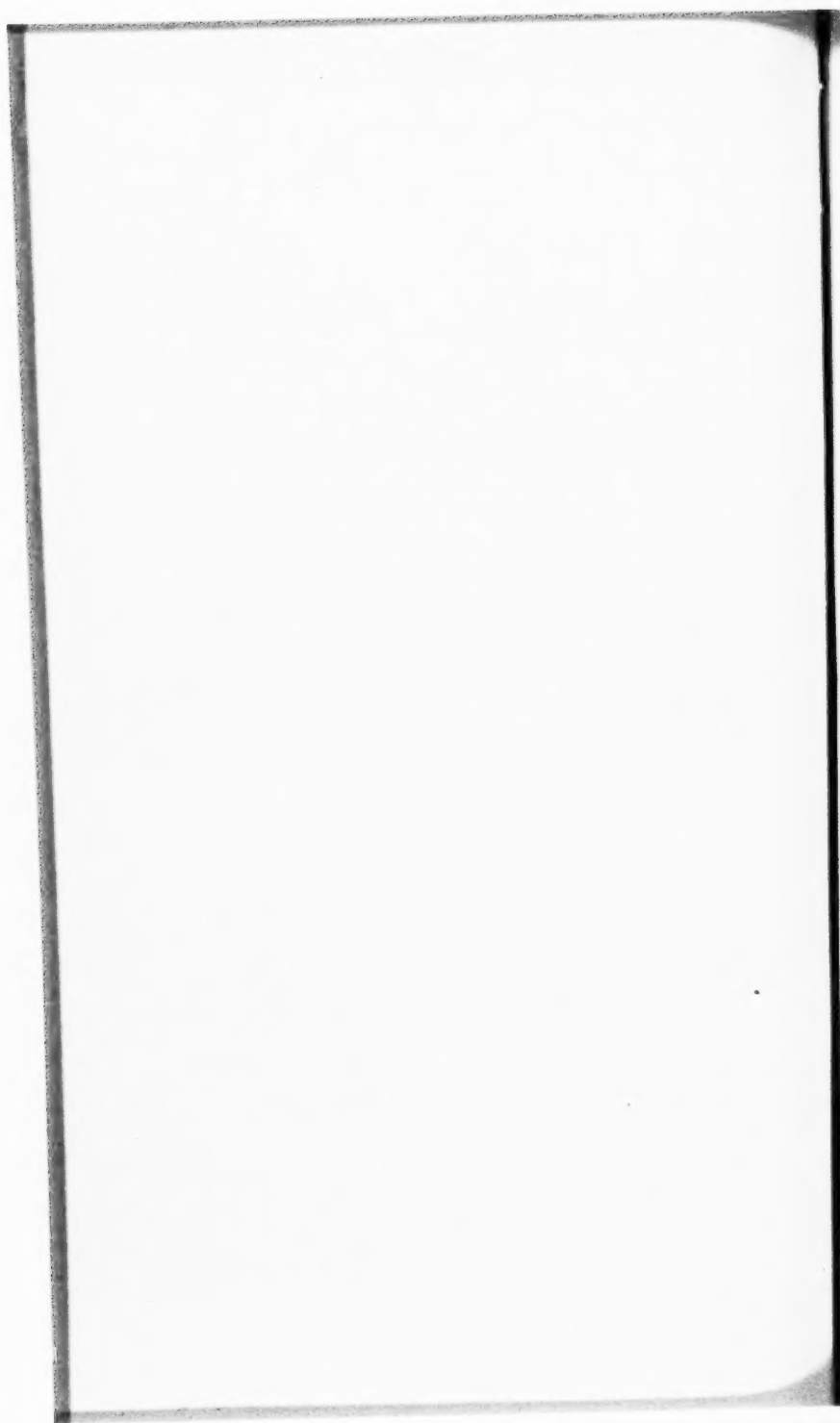
EDRIS B. MYERS.

bucketshops and operators of hand-books. The bucketshops bring supplied market quotations during the morning and early afternoon, and the race track information sent to the hand-book makers later on in the afternoon.

One of his methods of swindling in former years, was to open offices presumably for the purpose of swindling pool-rooms out of money by tapping wires. He and his confederate would then have some one put up the money to "beat" the poolroom, but instead of tapping the wires of the poolroom they would swindle the "dupe" out of the money which he had deposited with them.

Later on started in to tap pool-room wire extensively for the money he could derive out of it for his own benefit, and succeeded in swindling pool-rooms at Lake Charles, La., Fort Worth and Houston, Tex., (in May 1903) and later at Dayton, and Cincinnati, Ohio, and Covington and Louisville, Ky., out of large sums of money. Western Union Telegraph officials consider him a very dangerous man.

Edris B. Myers, age 52, 5 ft 8 1/4 in., 113 pounds, chestnut hair, blue eyes. Bertillon: 73.2; 68.0; 84.5; 18.1; 14.8; 13.0; 6.5; 25.8; 11.3; 8.6; 45.8.



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Affidavit of Henry S. Robbins.

In the District Court of the United States, Southern District of
New York.

ASSOCIATED PRESS

vs.

INTERNATIONAL NEWS COMPANY.

UNITED STATES OF AMERICA,

State of Illinois, Cook County, ss:

Henry S. Robbins, being duly sworn, says that he is an attorney at law in general practice in the city of Chicago, and has been the attorney of the Board of Trade of the City of Chicago for the last eighteen years, and has also been the attorney of the Cleveland Telegraph Company for about the same length of time; and that the suit of Cleveland Telegraph Company vs. Stone, et al., decided by Judge Kohlsaat, and reported in 105 Fed., 794, was a suit brought in the interest and for the benefit of the Board of Trade of the city of Chicago, and that affiant acted in said suit as the sole attorney of the Cleveland Telegraph Company and the Board of Trade.

That affiant is well acquainted with Melville E. Stone, General Manager of the Associated Press, and also is acquainted with Oscar M. Stone, the latter being a well known wire tapper, and that it was the said Oscar M. Stone and not Melville E. Stone who was a defendant in said suit.

HENRY S. ROBBINS.

Subscribed and sworn to before me this 20th day of January,
1917.

[SEAL.]

A. C. HEROY,
Notary Public.

(County Clerk's certificate attached.)

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Affidavit of Frederick Roy Martin.

United States District Court, Southern District of New York.

THE ASSOCIATED PRESS, Complainant,
against

INTERNATIONAL NEWS SERVICE, Defendant.

STATE OF NEW YORK,

County of New York, ss:

Frederick Roy Martin, being duly sworn deposes and says:
That he is Assistant General Manager of The Associated Press,

with headquarters in New York City; that he was present in the court during the argument of the motion for a temporary injunction in the above entitled case, on January 17th, 1917; that during said argument the counsel for the defendant stated as follows:

"The first intimation that we got that anybody claimed that we or any of our employees has done anything to meet with the displeasure of this great organization was when they threw these papers at us, followed by a long story in the newspapers of what fiends we are."

That the deponent desires to say that the complainant as a co-operative organization is under the obligation to furnish its members with important news so far as possible and its members expect it; that when the order to show cause herein was obtained, the question was carefully considered between the deponent, Mr. 87 Stone, General Manager, and the counsel of the organization as to whether the complainant ought or ought not to send to its members news in respect of the filing and the commencement of the suit and the making of this motion and information in respect to the bill of complaint and the affidavits upon which the same was founded; that the management determined that they would not send any news whatever in respect of the matter to any of their members pending hearing upon said motion, and they have not done so, and that The Associated Press has not sent a single line or reference of any kind to this proceeding to its members, although the matter has been published by the competing news agencies and the complainant has been besieged by its own members for full information in the matter.

FREDERICK ROY MARTIN.

Subscribed and sworn to before me this 19th day of January, 1917.

[SEAL.]

EDWARD U. ROTH,
Notary Public, No. 159, New York County.

88 H. *Affidavits Relative to the Obtaining of Complainant's
 News by the Defendant in the Office of the New York
 American.*

A. Replying to the Affidavits of Bradford Merrill (P. 7) and Lewis
 Taplinger (P. 15).

Affidavit of Ronald S. Wishart.

United States District Court, Southern District of New York.

THE ASSOCIATED PRESS, Complainant,

against

INTERNATIONAL NEWS SERVICE, Defendant.

STATE OF NEW YORK,
 County of New York, ss:

Ronald S. Wishart, being duly sworn, deposes and says: During
the period between March, 1915, and July, 1916, I was employed
by The Associated Press to inspect their Morkrum machines in the
offices of several New York newspapers, including the New York
American. In July, 1916, I was sent to the Texas border with
the National Guard and was there continuously until the time of
my very recent mustering out. I have read the affidavit of Lewis
Taplinger in this proceeding, in which he says that at no time
did he see Mr. Atwood "read or copy or make extracts or make
89 notes from any of The Associated Press matter received in
 the editorial rooms of the New York American," with the
 intimation that Mr. Atwood had never done so. I remember
distinctly that on nearly every night when I went to the American
office on my regular tour of inspection, I saw Mr. Atwood, an em-
ployee of the International News Service, examining The Asso-
ciated Press copy on the spindles at the copy-desk of the New York
American. I know that this was Associated Press copy because to
my personal knowledge such was the only copy that was placed
upon these spindles.

Refreshing my recollection by a memorandum which I prepared
at the time, I remember specifically that I saw Mr. Atwood in-
specting such copy on the night of December 4th, 1915, about
8:10 P. M.

RONALD S. WISHART.

Subscribed and sworn to before me this 20th day of January,
1917.

JOHN W. CAMPBELL,
Commissioner of Deeds, City of New York, N. Y.
N. Y. County Clerk's No. 108.

United States District Court, Southern District of New York.

THE ASSOCIATED PRESS, Complainant,

against

INTERNATIONAL NEWS SERVICE, Defendant.

STATE OF NEW YORK,

County of New York, ss:

Arthur Sullivan, being duly sworn, deposes and says: I am now employed by the American Lithograph Company and have been since January 10th last past. For two years prior to October 1, 1916, I was employed by The Associated Press and from April 25, 1915, to January 6, 1916, I was Morkrum Attendant in the office of the New York American.

I have read the affidavits of Bradford Merrill and Lewis Taplinger in this proceeding, in which they say that at no time did they see Mr. Atwood read or copy or make notes from any of The Associated Press matter received in the editorial rooms of the New York American, with the intimation that Mr. Atwood had never done so.

At numerous times during the course of my employment, I saw Mr. Atwood reading the copy taken from the Morkrum machines which carried exclusively the news of The Associated Press. Refreshing my recollection by a memorandum which I prepared and signed on December 3, 1915, I remember specifically that I first noticed Mr. Atwood inspecting such copy about a month before such date. I saw him looking over The Associated Press Morkrum copy so often that I asked one of the copy boys who he was
91 and learned that he was an employee of the International News Service.

Mr. Atwood came into the American editorial room about six times a night and often brought with him International News Service copy which he gave to the telegraph or war editor; then he looked over The Associated Press Morkrum copy, generally the cable news. Sometimes he made notes from this which he took with him when he returned to the rooms of the International News Service. When the war editor of the New York American went to lunch Mr. Atwood would generally sit at his desk and read over all the copy including the copy of The Associated Press from the Morkrum machine.

ARTHUR SULLIVAN.

Subscribed and sworn to before me this 20th day of January, 1917.

[SEAL.]

WM. H. BRUDER,

Notary Public, Bronx County, No. 35.

Certificate filed in New York County No. 45.

92 B. Replying to the Affidavits of Bradford Merrill (P. 13),
Percy T. Edrop (P. 21), and Martin T. Dunn (P. 22).

Affidavit of E. P. Koukol.

United States District Court, Southern District of New York.

THE ASSOCIATED PRESS, Complainant,

against

INTERNATIONAL NEWS SERVICE, Defendant.

STATE OF NEW YORK,

County of New York, ss:

E. P. Koukol, being duly sworn, deposes and says: I have read the affidavits of Bradford Merrill, Percy T. Edrop and Martin T. Dunn in this proceeding, in which they attempt to explain the incident related in my original affidavit, in reference to Mr. Dunn's orders to an office boy to run downstairs and inform them that the Austrian Emperor was dead upon receiving such information from The Associated Press Morkrum copy.

Under the circumstances of the incident, Mr. Dunn's statement could not conceivably have related to sending a boy to the "obit.," meaning the reference department of the New York American, as intimated in Mr. Merrill's affidavit, or to the war editor who was in the composing room, as intimated in the affidavits of Edrop and Dunn. I distinctly remember that the boy was told to go downstairs and the reference department was on the same floor as Mr.

93 Dunn's desk where the statement was made, and the composing room was on the floor above. I remember distinctly the statement in reference to sending someone to the "obit.," or reference department, and this was after the above mentioned order for a boy to go downstairs and had no reference thereto.

E. P. KOUKOL.

Subscribed and sworn to before me this 20th day of January, 1917.

[SEAL.]

WM. H. BRUDER,

Notary Public, Bronx County, No. 35.

Certificate filed in New York County No. 45.

94 III. *Affidavits Relative to the Obtaining of Complainant's News by the Defendant in the Office of the Cleveland News.*

A. In Reply to Affidavits of F. J. Wilson (P. 24), Barry Faris (P. 38), F. H. Ward (P. 45), (P. 50), and B. E. Cushing (P. 77).

Affidavit of Melville E. Stone.

United States District Court, Southern District of New York.

THE ASSOCIATED PRESS, Complainant,

against

INTERNATIONAL NEWS SERVICE, Defendant.

Affidavit.

STATE OF NEW YORK,

City and County of New York, ss:

Melville E. Stone, being duly sworn, deposes and says that during the entire time he has been General Manager of The Associated Press, except for a brief period of absence in 1912, he has kept in close personal touch with the management and conduct of the affairs of The Associated Press, and has been to a large extent familiar with its operations and methods; that he has been in almost daily attendance at the office; that he has himself formulated or approved instructions which were given to the various agents of The Associated Press

95 in respect to the gathering of news and knows the extent to which those instructions in general are carried out; that it has always been and is the general practice of The Associated Press to gather its news through its own agents and through interchange with news agencies abroad with which it has relations, and through its own members; that it has never, so far as deponent knows, taken such news, surreptitiously or otherwise, from the bulletins or the despatches of any rival news agency or from any newspaper which was not represented by membership in The Associated Press; that if any such appropriation of news has been made by the agents or representatives of The Associated Press, deponent would have been likely to have known of it, and that it would have been directly opposed to the long-standing and well-understood policy of this organization; that it has been the custom and the approved practice for the correspondent and representatives of The Associated Press scattered throughout the United States to report promptly to the Association any news development as it appeared anywhere, in any form, giving a mere announcement of a rumor or a current report; that it has been customary with correspondents and representatives of The Associated Press, upon learning in any way, either through publication in any newspaper or otherwise, of the happening of an important news event likely to interest The Associated Press, to notify the Association of

the fact in order that the Association might independently investigate it; but that in making up a report of a news event for The Associated Press, such correspondents and representatives have not been authorized to use the news despatches, either in whole or in part, of any rival or competing news-gathering association, or of any newspaper not represented by membership in The Associated Press, and that so far as deponent knows The Associated Press has not done so; that upon receiving any such rumor or current report, The Associated Press has investigated the subject through its own independent sources, and that any despatches it sent out were based upon
 96 its own investigation and were the product of its own enterprise and labor.

Deponent says further that his attention has been directed to the affidavit of Fred J. Wilson, General Manager of the International News Service, and particularly to the paragraphs on page 9, in which he says:

"The Cleveland bureau manager (of the International News Service), in his collection of the news local to Cleveland, is empowered to pay a stated salary to a man selected by him, who is employed in the office of the Cleveland News, and to make an arrangement with such person to assist him in getting whatever local news the Cleveland News would get which would be of interest to the clients of the Defendant";

that such employment and such service by an employe of the Cleveland News is in direct violation of the relation borne by The Associated Press and the Cleveland News; that it has been and is the general practice of The Associated Press, through its superintendents of divisions, to select representatives in the offices of the newspapers published by its members, who shall act as correspondents and supply to The Associated Press such news gathered by said newspapers as may be of interest to its members generally; that the By-laws of The Associated Press prescribe that the members "shall afford to such correspondents free access at all times to the news in their possession"; that in cities where such service makes sufficient demands upon the time of these correspondents, they are paid as compensation for such service a certain sum weekly with the full knowledge and approval of their employers; that an arrangement was made in April, 1916, by Paul Cowles, Superintendent of the Central Division of The Associated Press, with W. P. Leech and T. A. Robertson, Managers of the Cleveland News, by which B. E. Cushing, Telegraph
 97 Editor of the Cleveland News, was appointed as the correspondent of The Associated Press in the office of the Cleveland News and was to be paid for such service; that this arrangement was altogether open and above board and was in compliance with the obligations that had been assumed by the members representing the Cleveland News in The Associated Press to furnish The Associated Press with the news of the City of Cleveland and vicinage; that The Associated Press at no time forbade the Cleveland News from receiving the news reports of the International News Service, but that the

obligation of the Cleveland News to The Associated Press distinctly forbade the giving of the local news of Cleveland, or of the news received by the Cleveland News from The Associated Press, to the representatives of the International News Service, or any other news agency or newspaper not represented by membership in The Associated Press; that it was in violation of these conditions and obligations that the said Cushing entered into a surreptitious agreement and employment to serve the International News Service with the local news of Cleveland and the news received by the Cleveland News from The Associated Press, as he admits in his affidavit filed herewith; that the said Cushing was thus employed and paid as the correspondent of The Associated Press in the office of the Cleveland News merely for the purpose of furnishing to The Associated Press the local news gathered by the Cleveland News which, under its contractual relations with the Cleveland News it was entitled to receive, and not the news gathered by any other news agency, or any other or different news whatsoever; that so far as deponent knows, the said Cushing never did furnish any other such news to The Associated Press.

MELVILLE E. STONE.

Sworn to before me this 17th day of January, 1917.

[SEAL.]

EDWARD U. ROTH,

Notary Public, No. 159, New York City.

98

Affidavit of Frederick Roy Martin.

United States District Court, Southern District of New York.

In Equity.

No. E. 14-59.

THE ASSOCIATED PRESS, Complainant,

against

INTERNATIONAL NEWS SERVICE, Defendant.

STATE OF NEW YORK,

County of New York, ss:

Frederick Roy Martin, being duly sworn, deposes and says that he is Assistant General Manager of the Associated Press and has been for four years last past, and as such Assistant General Manager in the absence of the General Manager he has had occasion to fulfill the duties of his office and that he is familiar with the rules and practices of the Associated Press throughout all its connections, and that he has read the affidavit of Melville E. Stone, General Manager of the Associated Press, filed herewith, and that of his own knowledge he knows that the facts stated therein are true.

FREDERICK ROY MARTIN.

Sworn to before me this 17th day of January, 1917.

[SEAL.]

EDWARD U. ROTH,
Notary Public, No. 159, New York County.

99

Affidavit of W. P. Leech.

United States District Court, Southern District of New York.

THE ASSOCIATED PRESS, Complainant,

against

INTERNATIONAL NEWS SERVICE, Defendant.

Affidavit.

STATE OF OHIO,

County of Cuyahoga, ss:

W. P. Leech, being duly sworn deposes and says:

That he is the Vice-President and General Manager of the Cleveland Company, publishers of the Cleveland News.

That he has read the affidavits of E. A. Smiley, B. F. Field, Sam B. Anson and Karl Shimansky, in this proceeding, relating to the relations of B. E. Cushing of the Cleveland News, to both the complainant and the defendant in this proceeding.

That the Cleveland News had no contract or arrangement with the International News Service to supply to that service the local news of Cleveland, or any other news.

That deponent has known that such an arrangement with the International News Service would be in violation of the by-laws of The Associated Press, to which all members of The Associated Press have subscribed, and particularly Article VIII, Section 3 of the said by-laws, to wit:

“Each member shall take the news service of the corporation and publish the news regularly in whole or in part, in the newspaper named in his certificate of membership. He shall also furnish to the corporation all the news of his district, the area of which shall be determined by the Board of Directors.”

and Article VIII, Section 7:

“No member shall furnish or permit anyone to furnish to anyone not a member of this corporation, the news which he is required by the by-laws to supply to this corporation.”

That deponent through his assistants had informed Cushing that he must not supply news of any kind to the International News Service. That when the defendant made a secret arrangement with Cushing to furnish any news to the defendant, it was in violation of his orders, and of the by-laws of The Associated Press, and altogether without the knowledge of this deponent.

That the situations of the complainant and defendant respectively with respect to the Cleveland News are wholly different. That under the obligations of the Cleveland News to The Associated Press, it has agreed to furnish to The Associated Press the news of Cleveland and vicinage.

That under the aforesaid obligations contained in the by-laws of The Associated Press, to which the Cleveland News had agreed, it cannot furnish to the International News Service, any news received by the Cleveland News, either the local news of Cleveland, or the general news supplied to the Cleveland News by The Associated Press.

W. P. LEECH,

Witness:

T. A. ROBERTSON.

STATE OF OHIO,

City of Cuyahoga, ss:

Subscribed and sworn to before me this 19th January,

F. R. GROSSER,

Notary Public.

[County Clerk's certificate.]

101

Affidavit of B. E. Cushing.

United States District Court, Southern District of New York.

THE ASSOCIATED PRESS, Complainant,

against

INTERNATIONAL NEWS SERVICE, Defendant.

Affidavit.

STATE OF NEW YORK,

City and County of New York, ss:

B. E. Cushing being duly sworn deposes and says that since January 1, 1914, he has been in the employment of the Cleveland (O.) News, acting as telegraph editor; that during that time he acted as correspondent of the International News Service as set forth in detail in another affidavit filed herein; that during a portion of that time he assisted the correspondent of The Associated Press in covering the local news of Cleveland collected by the Cleveland News, to which The Associated Press was exclusively entitled under the membership of the said Cleveland News in The Associated Press; that at such times as he acted as assistant to The Associated Press correspondent he did so with the full knowledge and approval of his superiors on the Cleveland News; that in April, 1916, when he was last employed to assist the local correspondent in Cleveland such

employment was specifically approved by his superior, T. A. Robertson, managing editor of the Cleveland News; that at all times during which he acted as such Associated Press correspondent it was generally known among the staff of the Cleveland News, there being no cause to keep such connection secret; that when he communicated with the local correspondent of The Associated Press, whose office is in the same building with the Cleveland News, he did so openly from the telephone on his desk or personally with the correspondent at such desk when the correspondent would call on him, such relation being open and above board; that at no time during his employment with The Associated Press did he make a practice of divulging to The Associated Press the dispatches of the International News Service; that at no time did there exist an understanding with anyone in The Associated Press that he was to do so; that he was not engaged by The Associated Press to so divulge such dispatches; that the same was not expected of him, nor did he engage in the practice of divulging said dispatches of the International News Service to The Associated Press; that his sole duty in employment so far as The Associated Press was concerned was to assist the local correspondent of the said Associated Press in Cleveland to cover the news of Cleveland and vicinity as collected by the Cleveland News and to which the Associated Press was entitled under the Cleveland News' membership obligations; that during the time he furnished news to the International News Service as set forth in another affidavit filed herein he did so without the knowledge or approval of his superiors on the said Cleveland News; that the relationship was secret; that it was unknown even to his assistants working near him; that The Associated Press correspondent in Cleveland was in ignorance of said connection with the International News Service; that when he communicated with the said International News Service he did so secretly either in a telephone booth or at a telephone in a remote corner of the Cleveland News editorial room; that during a portion of the time when he was in the employment of the International News Service he did divulge to the International News Service the contents of Associated Press dispatches; that there existed an understanding between him and the local manager of the International News Service in Cleveland that he was to do so; that he believed this was expected of him in connection with employment by the International News Service.

B. E. CUSHING.

Subscribed and sworn to before me this 17th day of January, 1917.

[SEAL.]

EDWARD U. ROTH,
Notary Public, No. 159, New York County.

Affidavit of Fred W. Agnew.

United States District Court, Southern District of New York.

THE ASSOCIATED PRESS, Complainant,

against

INTERNATIONAL NEWS SERVICE, Defendant.

STATE OF OHIO,

County of Cuyahoga, ss:

Fred W. Agnew, being first duly sworn deposes and says that from January 17, 1914, until December 29, 1916, he was employed by the International News Service at Cleveland, Ohio; that he has read the affidavit of Frank H. Ward in this proceeding, in which the said Ward declares that in respect of the explosion of a powder plant at Peterboro, Ontario, on December 11, 1916, he is "pretty sure that he rewrote the bulletin from an early edition newspaper and did not get it from Cushing." Second, that in reference to the story of a mine cave-in at Alabama, he obtained the information from the one o'clock edition of the Cleveland News, after it had been printed. That this deponent is familiar with the circumstances and that Mr. Ward's statement in respect to both of these news dispatches is inaccurate, but that he did receive the same from the said Cushing. That deponent's knowledge of the above fact is based upon the following ground: The dispatches in question could not have been taken from any edition of [a] newspaper since the dispatches in question appeared in the service of the International News Service prior to the appearance of the earliest edition in which the Associated Press dispatches could have appeared.

FRED W. AGNEW.

Subscribed and sworn to before me this 19th day of January, 1917.

[SEAL.]

F. R. GROSSER,
Notary Public.

Com. expires Sept. 25th, 1919.

Affidavit of Kent Cooper.

United States District Court, Southern District of New York.

THE ASSOCIATED PRESS, Plaintiff,

against

INTERNATIONAL NEWS SERVICE, Defendant.

Affidavit.

Kent Cooper, being duly sworn, deposes and says: that to the best of his information and belief Frank H. Ward became Manager of the International News Service office at Cleveland, Ohio, in November, 1916; that upon instructions from the headquarters of the International News Service in New York said Ward took up the work formerly carried on by one Fred W. Agnew in respect to the piracy of Associated Press dispatches in the office of the Cleveland News; that the International News Service was expelled and forbidden to transmit any news from England on October 10, 1916, and from Canada on November 8, 1916; that said Ward in behalf of his employers began transmitting London and Canadian news from the International News Service office in Cleveland, Ohio, in November, 1916, such despatches being based on Associated Press despatches that had been delivered to the Cleveland News and which reached said Ward through a conspiracy engaged in by employees of the International News Service with one B. E. Cushing, telegraph editor of the Cleveland News; that said Ward engaged himself with the International News Service at a salary of \$35 weekly in November, 1916; that after having thus protected the

International News Service on London and Canadian news
for a period of about three weeks he wrote the following
letter to Fred J. Wilson, General Manager of the International News Service:

"Cleveland Bureau,

720 The Arcade.

December 12, 1916.

Mr. Fred J. Wilson, General Manager, I. N. S., New York City.

DEAR MR. WILSON: I am going to be married Saturday and need \$40 a week.

I realize that it probably isn't customary for a man who has been in charge of a bureau not quite a month to ask for a raise, but when I gave up the news bureau in Columbus which was netting me a minimum of \$50 a week, did it at the earnest solicitation of Roy Moore, a personal friend.

Roy with his customary enthusiasm, extolled the virtues of the

I. N. S. and the possibilities of one who made good until he had me completely hypnotized. Mr. Faris also was very kind and said that if I made good he would move me to Washington as soon as possible as they needed a man there who knew Ohio politics.

I think I've been here long enough for you to decide whether or not I have made good. I've tried to protect you on London and Canadian news, filed everything on the trunk worth while, cut down the state file of foreign stuff where possible and filled in with Ohio stuff, and tried hard to land new business.

If I've made good, I think the job here is worth at least \$40.

If not, I'm not worth \$35. I wouldn't be so anxious for
107 more money right off the bat if I intended to keep working
in single harness. When I took the job I didn't contem-
plate matrimony so soon.

I write this in the spirit of the greatest regard for everyone connected with the I. N. S. I like my work, believe in the service, and feel sure a raise would have come soon, unsolicited, if I were in a position so that I could wait.

If to get \$40, a change would have to be made to some other bureau it would suit me. Please weigh the matter and let me know over the wire as soon as possible, as I have an offer pending.

Most cordially,

FRANK H. WARD."

that upon receipt of the aforesaid letter said Wilson turned it over to one Barry Faris, news manager of the International News Service and that said Faris replied to said Ward as follows:

"Cable Address: Hearstite.

International News Service,

238 William St.,

New York.

Treasurer's Office.

December 14, 1916.

Mr. F. H. Ward, International News Service, 720 The Arcade,
Cleveland, Ohio.

MY DEAR MR. WARD: Your letter to Mr. Wilson requesting a raise came as a considerable surprise. I had hardly expected such a
communication from you so quickly. However, under the
108 circumstances, I think we must meet your wishes, and begin-
ning with the coming week you will be placed on the pay-
roll at \$40.00.

Yours very truly,

B. F. (M. O.).

BARRY FARIS."

KENT COOPER.

Sworn to before me and subscribed in my presence this 17th day of January, 1917.

[SEAL.]

EDWARD U. ROTH,
Notary Public, No. 159, New York County.

109 B. Replying to the Charge of Animus Contained in the Affidavits of E. C. Campbell (pp. 70, 72) and G. T. Hattie (p. 75).

Affidavit of Fred W. Agnew.

United States District Court, Southern District of New York.

THE ASSOCIATED PRESS, Complainant,

against

INTERNATIONAL NEWS SERVICE, Defendant.

STATE OF OHIO,

County of Cuyahoga, ss:

Fred W. Agnew being duly sworn, deposes and says that he has read the affidavits of Edward C. Campbell and Geo. T. Hattie in this proceeding, intimating that he left the employment of the International News Service under circumstances which created an animus on his part against such news service; that such a statement is untrue; that he resigned voluntarily from the employment of the International News Service and that at the time of such resignation the relations between deponent and the International News Service were entirely pleasant, as is shown by the following letter:

New York, Dec. 30th, 1916.

Mr. F. W. Agnew, 720 Superior Arcade, Cleveland, O.

DEAR MR. AGNEW: I was very sorry to receive notice of your resignation, for in addition to the fact of your regularity,
110 my experience in this business tells me that you are one of the best telegraphers we have had in this service. You can feel certain of re-employment in the International News Service any time you may wish to return to it and there be a vacancy to fill.

You have my very best wishes for your success in your new field and I hope that each succeeding year will record additions to your fame and fortune.

Sincerely yours,
(Signed)

PERCY THOMAS.

Deponent further says said Hattie was relieved by Agnew at 10:00 A. M. each day and was not with him in the office of the International News Service; that he never worked for the Associated

Press at Topeka, Kan., and has not been in their employ since Aug. 1st, 1910.

FRED W. AGNEW.

Subscribed and sworn to before me this 19th day of Jan., 1917.

[NOTARIAL SEAL.]

F. R. GROSSER,

Notary Public.

My commission expires Sept. 25, 1919.

111 IV. *Affidavits Relating to the "Clean Hands" Defense.*

A. Replying to the Charge That Complainant was Obtaining Defendant's News, from the Cleveland News' Office, Contained in the Affidavit of E. B. Smiley (p. 54) (p. 59), B. F. Field (p. 61), J. B. Anson (p. 65), and Karl Shimansky (p. 68).

Affidavit of Paul Cowles.

United States District Court, Southern District of New York.

THE ASSOCIATED PRESS, Complainant,

against

INTERNATIONAL NEWS SERVICE, Defendant.

Affidavit.

STATE OF NEW YORK.

County of New York, ss:

Paul Cowles, being duly sworn deposes, and says: That he is the Superintendent of the Central Division of The Associated Press.

That he has read the affidavits of E. A. Smiley, Sam B. Anson, Benjamin F. Field and Karl Shimansky, in this proceeding, relating to the relations of B. E. Cushing, of the Cleveland News, to both the Complainant and the defendant in this cause.

That he engaged B. E. Cushing of the Cleveland News in April, 1916, to furnish The Associated Press with news originating
112 in Cleveland and vicinity, which the Cleveland News had received.

That Mr. Cushing was thus engaged on the recommendation of Thomas A. Robertson, the Managing Editor of the Cleveland News, who said Cushing, through his experience in handling The Associated Press news report, knew better than other men on the staff, the kind of local news suitable for the Associated Press, and had the quickest and best access to such news.

That it was the distinct understanding that Cushing was to furnish to The Associated Press, only the news of Cleveland and vicinage, to which it was entitled under the by-laws of The Associated Press, and not the news of any other news distributing agency.

That if the news of other news distributing agencies had been

offered, under the rules in force in my division, it would have been refused and would not have been used by us. That never to my knowledge was such news of other associations offered to us by said Cushing.

PAUL COWLES.

Sworn to before me this 18th day of January, 1917.

EDWARD U. ROTH,
Notary Public No. 159, New York County.

113

Affidavit of J. W. McGuire.

United States District Court, Southern District of New York.

THE ASSOCIATED PRESS, Complainant,
against

INTERNATIONAL NEWS SERVICE, Defendant.

STATE OF NEW YORK,

County of New York, ss:

J. W. McGuire, being duly sworn, deposes and says that he is and has been for the last fifteen years employed by The Associated Press in the City of Cleveland, State of Ohio, and has served The Associated Press in three capacities. First as a telegraph operator; second as assistant to the resident correspondent; and, third, as correspondent or manager of The Associated Press Bureau in Cleveland.

That during the period of his employment as correspondent of The Associated Press in Cleveland, all of the news supplied by B. E. Cushing for The Associated Press news service, was submitted to deponent before transmission over the wires of The Associated Press.

That at no time during his connection with the service of The Associated Press in Cleveland did he receive from B. E. Cushing any news items which, to deponent's knowledge, originated in the dispatches of the International News Service.

That the only news items which he received from said Cushing were items relating to the news in Cleveland and vicinage, which items, Cushing, as representing the Cleveland News, was
114 obliged to furnish The Associated Press, by reason of the membership or obligations of the organization.

That he has read the affidavits of E. A. Smiley, Benjamin F. Field, Sam B. Anson, and Karl Shimansky, in this proceeding, and that any statement therein to the effect that the said B. E. Cushing from time to time called him on the telephones to communicate to him the contents and dispatches of the International News Service, is wholly untrue.

J. W. MCGUIRE.

Sworn to before me this 18th day of January, 1917.

[SEAL.]

EDWARD W. ROTH,
Notary Public No. 159, New York County.

Affidavit of J. R. Youatt.

United States District Court, Southern District of New York.

THE ASSOCIATED PRESS, Complainant,

against

INTERNATIONAL NEWS SERVICE, Defendant.

STATE OF NEW YORK,

City and County of New York, ss:

J. R. Youatt, being duly sworn, deposes and says, that he is and has been Auditor or Treasurer of The Associated Press since its organization. That it has been his practice throughout the
115 United States where The Associated Press has several correspondents in the offices of its members to send a check covering the salary and expenses of all local correspondents to one chief correspondent; that since April, 1916, J. W. McGuire has been the Chief Correspondent of The Associated Press in Cleveland; that weekly checks have been sent to said McGuire covering his salary and expenses as well as the salary of B. E. Cushing and others who have served as correspondents of The Associated Press in Cleveland; that said McGuire has paid Cushing in currency his weekly salary; that this is the invariable practice where similar arrangements prevail throughout the United States in the offices of The Associated Press and that the payment in currency to said Cushing was in no way to conceal the arrangement with Cushing which arrangement appears on the records of the organization and the weekly disbursement report of the Cleveland Office.

J. R. YOUATT.

Sworn to before me this 17th day of January, 1917.

[SEAL.]

EDWARD U. ROTH,

Notary Public No. 159, New York County.

116 Affidavits of Alfred M. Corrigan, Albert J. Hain, H. J. Weiden-
thal, C. A. Wellmann, and Joseph Williams.

United States District Court, Southern District of New York.

THE ASSOCIATED PRESS, Complainant,

against

INTERNATIONAL NEWS SERVICE, Defendant.

Affidavit.

STATE OF OHIO,

County of Cuyahoga, ss:

Before me, Franklin H. Farasey, a notary public in and for the county and state aforesaid, personally appeared Alfred M. Corrigan, who, being first duly sworn, deposes and says:

I live at 1345 Warren Road, Lakewood, Ohio. I have been employed by The Cleveland News about four years. For the past six months I have been city editor of the Cleveland News, succeeding Sam B. Anson. Prior to becoming city editor I was assistant city editor under Mr. Anson. I sit in the middle of the horse shoe desk used by myself and my assistants, the telegraph editor and makeup editor. My chair is to the left of B. E. Cushing, who faced me at a distance of less than three feet. I know of no instructions, tradition or understanding that any employe of The Cleveland News should give International News Service dispatches to the Associated Press. This question was never discussed with me by Sam B. Anson. I

117 I have never given International News Service dispatches to the Associated Press, nor have I ever heard B. E. Cushing or anybody else giving International News Service dispatches to the Associated Press. I have read the affidavits of Benjamin F. Field, E. A. Smiley, Sam B. Anson and Carl Shimansky, all contained in document entitled "United States District Court, Southern District of New York. The Associated Press, Complainant, against International News Service, Defendant. Affidavits Submitted in Opposition To Application For A Temporary Injunction."

Further affiant saith not.

A. M. CORRIGAN.

Sworn to before me and subscribed in my presence this 19th day of January, A. D. 1917.

FRANKLIN H. FARASEY,

Notary Public in and for Cuyahoga County, Ohio.

My Commission Expires —.

[County Clerk's certificate.]

STATE OF OHIO,

County of Cuyahoga, ss:

Before me, Franklin H. Farasey, a notary public in and for the county and state aforesaid, personally appeared T. J. Thomas, who, being first duly sworn, deposes and says:

I live at 1509 Olivewood Avenue, Lakewood, Ohio. I am employed on The Cleveland News as a copy reader and rewrite man and in charge of the local and telegraph departments of the Cleveland News between the hours of 3:30 and 6:30 P. M. I sit at the horse shoe desk occupied by the city editor, rewrite man, telegraph editor and makeup man, sitting to the left of A. J. Hain, and to the
118 right of B. E. Cushing, until recently telegraph editor of The Cleveland News. I succeeded E. A. Smiley. I have never understood that International News Service dispatches were to be given to the Associated Press. I never heard Mr. Cushing giving International News Service dispatches to the Associated Press. I have never given International News Service dispatches to the Associated Press while in charge of the editorial department of The Cleveland

News between the hours of 3:30 and 6:30 P. M. nor at any other time, and I have never heard anyone else giving International News Service dispatches to the Associated Press.

I have read the affidavits of Benjamin F. Field, E. A. Smiley, Sam B. Anson and Carl Shimansky, all contained in document entitled "United States District Court, Southern District of New York. The Associated Press, Complainant, against International News Service, Defendant. Affidavits Submitted in Opposition to Application for a Temporary Injunction."

Further affiant saith not.

T. J. THOMAS.

Sworn to before me and subscribed in my presence this 19th day of January, 1917.

[SEAL.]

FRANKLIN H. FARASEY,

Notary Public in and for Cuyahoga County, Ohio.

My Commission expires —.

[County Clerk's certificate.]

119 STATE OF OHIO,

County of Cuyahoga, ss:

Before me, Franklin H. Farasey, a notary public in and for the county and state aforesaid, personally appeared Albert J. Hain, who, being first duly sworn, deposes and says:

I am employed by The Cleveland News as telegraph editor, and have held this position for the past ten days. Prior to that time, and for a period of approximately one year, I have been employed by the same company as copy reader and rewrite man. The desk where I have been working in both these positions is a horseshoe in shape. The city editor sits in the middle. Beginning at the city editor's left on the outside of the rim, the men employed for the past several months in similar capacities have been Joseph Williams, myself, T. J. Thomas, B. E. Cushing and C. A. Wellman. Wellman acted as makeup man and helped with the telegraphic news.

My seat at the desk was approximately six feet from that of B. E. Cushing, who sat directly across the desk from me. During Mr. Cushing's vacation last summer, I believe for a period of two weeks in July, I acted as telegraph editor. I gave no International News Service dispatches to the Associated Press during this period, nor have I done so at any other time.

At no time during my connection with the Cleveland News in any capacity have there been any instructions issued to me that International News Service dispatches should be given to the Associated Press. Neither has there been to my knowledge any understanding or tradition to this effect. I never have heard Mr. Cushing or anybody else giving International News Service dispatches to the Associated Press. The understanding has been that there was to be no interchange of news between the two services through The Cleveland

News office. I know of positive instructions issued by the
120 managing editor, T. A. Robertson, that there should be no
interchange of news dispatches.

I have read the affidavits of Benjamin F. Field, E. A. Smiley, Sam
B. Anson and Carl Shimansky, all contained in document entitled
"United States District Court, Southern District of New York. The
Associated Press, Complainant, against International News Service,
Defendant. Affidavits Submitted in Opposition to Application for a
Temporary Injunction."

Further affiant saith not.

A. J. HAIN.

Sworn to before me and subscribed in my presence this 19th day of
January, 1917.

[SEAL.]

FRANKLIN H. FARASEY,

Notary Public in and for Cuyahoga County, Ohio.

My commission expires Sept. 9th, 1919.

[County Clerk's certificate.]

STATE OF OHIO,

County of Cuyahoga, ss:

Before me, Franklin H. Farasey, a notary public in and for the
county and state aforesaid, personally appeared Henry J. Weiden-
thal, who, being first duly sworn, deposes and says:

I live at 1577 Robinwood Avenue, Lakewood, Ohio. I have been
employed by The Cleveland News about eight years. During this
time I have been assistant to the managing editor and news editor
of The Cleveland News. My desk immediately adjoins the horse shoe
desk, with B. E. Cushing, until recently, telegraph editor immedi-
ately in front of and about three feet from me. I never have under-
stood, nor have there ever been any instructions from anyone
121 to the effect that International News Service dispatches should
be given to the Associated Press. On the contrary, I have
known that International News Service dispatches should not be
given to the Associated Press. Positive instructions were issued by
the managing editor about a year ago covering this point in particu-
lar—that every precaution must be taken to prevent any interchange
of news dispatches. I have never given International News Service
dispatches to the Associated Press. Neither have I heard Mr. Cush-
ing or anyone else at any time doing so. I have read the affidavits of
Benjamin F. Field, E. A. Smiley, Sam B. Anson and Carl
Shimansky, all contained in document entitled "United States Dis-
trict Court, Southern District of New York. The Associated Press,
Complainant, against International News Service, defendant. Alli-
davit Submitted in Opposition to Application for a Temporary In-
junction."

Further Affiant saith not.

HENRY J. WEIDENTHAL.

Sworn to before me and subscribed in my presence this 19th day of January, A. D. 1917.

[SEAL.]

FRANKLIN H. FARASEY,

Notary Public in and for Cuyahoga County, Ohio.

My Commission expires —.

[County Clerk's certificate.]

122 STATE OF OHIO,

County of Cuyahoga, ss:

Before me, Franklin H. Farasey, a notary public in and for the county and state aforesaid, personally appeared C. A. Wellman, who, being first duly sworn, deposes and says:

I am employed by The Cleveland News as makeup man and assistant to the telegraph editor, and I have held this position since November, 1915. When I am not at the composing room my place is at the horse-shoe desk used by the city editor, copy readers and the telegraph editor. My seat has been to the left of that occupied by B. E. Cushing. I know of no instructions or understanding of any kind that we, as employees of The Cleveland News, should furnish International News Service dispatches to the Associated Press. I never heard Mr. Cushing, or anyone else employed by The Cleveland News, giving International News Service dispatches to the Associated Press. I succeeded Benjamin F. Field as makeup editor. I have read the affidavits of Benjamin F. Field, E. A. Smiley, Sam B. Anson and Carl Shimansky, all contained in document entitled "United States District Court, Southern District of New York. The Associated Press, Complainant, against International News Service, Defendant. Affidavits Submitted in Opposition to Application for a Temporary Injunction."

Further alliant saith not.

C. A. WELLMAN.

Sworn to before me and subscribed in my presence this 19th day of January, A. D. 1917.

[SEAL.]

FRANKLIN H. FARASEY,

Notary Public in and for Cuyahoga Co., O.

My commission expires Sept. 9, 1919.

[County Clerk's certificate.]

123 STATE OF OHIO,

County of Cuyahoga, ss:

Before me, Franklin H. Farasey, a notary public in and for the county and state aforesaid, personally appeared Joseph Williams, who, being first duly sworn, deposes and says:

I live at 230 Savannah Road, East Cleveland, Ohio. My posi-

tion has been that of Assistant City Editor of The Cleveland News, and I have been employed by The Cleveland News for the past five months. I occupy a chair at the horse shoe desk used by the city editor, the rewrite man, telegraph editor and makeup department. I have the first chair at the extreme left end of the horse shoe desk. This is about six feet from the chair occupied by B. E. Cushing at the same desk. I know of no instructions or tradition or understanding that any employee of The Cleveland News should give International News Service dispatches to the Associated Press. I have never given International News Service dispatches to the Associated Press. I have never heard B. E. Cushing or anyone else giving International News Service dispatches to the Associated Press. I have read the affidavits of Benjamin F. Field, E. A. Smiley, Sam B. Anson and Carl Shimansky, all contained in document entitled "United States District Court, Southern District of New York. The Associated Press, Complainant, against International News Service, Defendant. Affidavits Submitted In Opposition to Application For a Temporary Injunction."

Further affiant saith not.

JOSEPH WILLIAMS,

Sworn to before me and subscribed in my presence this 19th day of January, A. D. 1917.

FRANKLIN H. FARASEY,

Notary Public in and for Cuyahoga County, Ohio.

My commission expires —.

[County Clerk's Certificate.]

124 Affidavit of Frederick Roy Martin.

United States District Court, Southern District of New York.

In Equity.

No. E. 14-59.

THE ASSOCIATED PRESS, Complainant,

against

INTERNATIONAL NEWS SERVICE, Defendant.

STATE OF NEW YORK,

County of New York, ss:

Frederick Roy Martin, being duly sworn, deposes and says that he has read the affidavit of E. A. Smiley in this proceeding and noticed the statements therein in reference to the death of Pope Pius; that The Associated Press did not report the death of Pope Pius while he was still ill, nor did it report it in the afternoon of any day,

but reported it during the night time and not until after the death of the Pope.

FREDERICK ROY MARTIN.

Sworn to before me this 17th day of January, 1917.

[SEAL.]

EDWARD U. ROTH,

Notary Public, No. 159, New York County.

125 B. Replying to the Charge that Complainant Obtains News from Defendant's Employees Contained in Defendant's Group No. 3.

Replying to Affidavits of W. G. Warnock (p. 79) and V. H. Loomis (p. 91).

Affidavit of Charles E. Kloeber.

United States District Court, Southern District of New York.

THE ASSOCIATED PRESS, Complainant,

against

INTERNATIONAL NEWS SERVICE, Defendant.

STATE OF NEW YORK.

City and County of New York:

Charles E. Kloeber, being duly sworn, deposes and says:

I have been in the service of The Associated Press since 1897, with the exception of three brief intervals during which I was engaged in other business. During my period of service with the Association I have held various important executive positions having to do with the direction of the news service, and since July 30, 1912, I have been Chief of the News Department of that organization, and as such I am directly in control, under the General Manager and the Assistant General Manager, of the news service of The Associated Press throughout the world. I am familiar with all
126 the rules, instructions, traditions and precedents of this service, and it is of my personal knowledge that all employees of this service are prohibited from taking or using as Associated Press despatches the despatches or stories of other news agencies or of newspapers not members of The Associated Press. This rule has been strictly enforced during the entire period of my service with the organization.

All employees of the Associated Press, however, obviously are under instructions to immediately report to their next superior office-rumors or hints of news occurrences in order that they may be investigated through our own efforts and original stories thereon prepared for the service of The Associated Press.

I cannot recall a single instance in my entire connection with the service wherein a despatch has been used by The Associated Press

reproducing despatches carried by other agencies or on hints that such stories were being carried by other agencies, without originally investigating and ascertaining the facts through our own sources.

I have read the affidavits of William G. Warnock and Victor H. Loomis. In respect to the sinking of the steamship *Lusitania*, referred to therein, the facts are as follows:

The first intimation of the sinking of the *Lusitania* was received in the New York office of The Associated Press on the afternoon of May 7, 1915, through the ticker service of the Dow-Jones Company, which ticker service carried a report that the ship had been torpedoed. This office immediately called the New York offices of the Cunard Steamship Company by telephone and confirmed the report. Thereupon The Associated Press sent out through its service, at 1:17 p. m. that day the following despatch:

Bulletin E. O. S.

"New York, May 7.

"The Cunard Steamship Company announced to-day that 127 it had received from its agents in England an unconfirmed report that the steamship *Lusitania* had been torpedoed off the coast of Ireland."

I personally participated in the work of getting this information in conjunction with Meredith N. Stiles and George Naeder, of the New York office of The Associated Press, who are fully cognizant of the facts.

It is believed that it can be substantiated that it was a Dow-Jones reporter who first received news of the sinking of the *Lusitania* from the offices of the Cunard Company.

There is no message of any sort in our files from E. F. Wilson, or from Syracuse, giving us any information or tip upon the service.

In respect to the explosion in Solvay, near Syracuse, referred to in the affidavit of William G. Warnock, the facts are as follows:

On May 22, 1915, there was an explosion of dynamite while being transported in an automobile in Syracuse, New York, resulting in the death of a number of persons. The first intimation of this disaster received by the Associated Press was in a message from our Columbus, Ohio, office, at 2:45 p. m. This message was promptly relayed to our Syracuse correspondent, stating that it was reported that a disaster had occurred in that city. At 2:52 p. m. we received the following bulletin from Syracuse:

"Syracuse, N. Y., May 22.

"Five persons are reported to be killed and 25 others injured here this afternoon when a case of dynamite in an automobile exploded shortly after 2 o'clock. The explosives were to be used in dynamiting Onondaga Creek."

"(Moore.)"

The only message received from E. F. Wilson, then in Syracuse on the Barnes-Roosevelt libel case, that appears in our records of that day is as follows:

128 "C. S. B., New York:

"Can I do anything on explosion? Am after Draper.
(Signed) "WILSON, 3:28 p. m."

To this message the following reply was sent:

"Wilson, Syracuse:

"No thanks; regular man should get the night story.
(Signed) "C. S. B. 3, 3:41 p. m."
CHARLES E. KLOEBER.

Sworn to before me this 17th day of January, 1917.
[SEAL.] EDWARD U. ROTH,
Notary Public, No. 159, New York County.

129 Affidavit of E. Frank Wilson.

United States District Court, Southern District of New York.

THE ASSOCIATED PRESS, Complainant,

against

INTERNATIONAL NEWS SERVICE, Defendant.

Affidavit.

CITY OF NEW YORK,
County of New York, ss:

E. Frank Wilson, being duly sworn, deposes and says:

I am an employe of the Traffic Department of The Associated Press in its New York office.

That during the month of May, 1915, I was in the Onondaga County Court House, at Syracuse, N. Y., representing The Associated Press at the time of the trial of the Barnes-Roosevelt libel suit; that I have read the affidavit of William G. Warnock, of Syracuse, N. Y., in this proceeding, in which he accuses me of giving to The Associated Press information on the sinking of the steamship Lusitania which came over the wires of the International News Service into the Onondaga County Court House; that I deny each and every statement of said W. G. Warnock in that respect; that I specifically deny the following statement attributed to me in the said affidavit of W. G. Warnock, and the whole of it:

"Yes, I was in the telegraph room at the court house and heard your (the International News Service) flash and the start of the story, but noticed that there was nothing coming on our

130 wire. I tipped them (The Associated Press) off on it and they seemed pretty d— glad to get the tip”;

that I neither heard from the International News Service wire nor from any other wire, nor communicated to The Associated Press on the date in question, any news whatsoever in connection with the sinking of the Lusitania;

That I have noted W. G. Warnock's further reference to the explosion occurring at Solvay, a suburb of Syracuse, N. Y.; that I did not receive from the International News Service or any employee of that service any information in respect of this explosion; that it was a matter of common knowledge in Syracuse that such an explosion had occurred, and that the only message respecting it that I sent to The Associated Press was sent at 3:28 P. M., nearly two hours after the explosion had occurred, and was in the words following:

“C. S. B., New York:

“Can I do anything on explosion?”

“Am after Draper.

(Signed)

WILSON, 3:28 p. m.”

That some time before this message was sent, The Associated Press correspondent in Syracuse had sent the news of the explosion to the New York office of The Associated Press, which in turn had distributed it to its members generally; that my only purpose was to offer my services to aid in further reporting the matter

Deponent further says that he has read the affidavit of Victor H. Loomis in this proceeding; that the statement of the said Loomis that on the day in question he used a loud sounder is not true, and that this deponent did not and could not hear any information

passing over the wires of the International News Service;

131 that although the uniform practice of The Associated Press is not to permit its correspondents or operators receiving or sending its news to perform these functions in the same room with the correspondent or telegraph operator of any other news-agency, the situation at Syracuse was peculiar and unusual; a room in the courthouse had been set apart for the use of the telegraph operators of the telegraph companies, of the news agencies, and of some newspapers, and the deponent was required to do his work in the same room as the representative of the defendant; that he was located at the same table with the Western Union operators, which was between him and a small table situated about ten feet away at which the said Loomis sat; that while so engaged in listening to his own instrument, and with the noise made by the Western Union instruments also intervening, he could not possibly have read intelligently the Morse characters upon the instrument operated by the said Loomis, and that the statement of the said Loomis in his affidavit that on the day in question he used a loud sounder, and the implication contained therein that in consequence the deponent heard over Mr. Loomis's wire the news of the sinking of the Lusi-

tania, is not true; that this deponent says he could not hear any information passing over the wires of the International News Service on the day in question; that he denies wholly and absolutely the alleged statement appearing *on* [in] the affidavit of the said Loomis to the following effect:

"That Mr. Wilson, the operator of The Associated Press, had said to him, Warnock, in substance and effect, that it was possible to get the news from the opposition wire (meaning by opposition the International News Service wire)."

that he did not obtain the news of the sinking of the Lusitania or any other news at any time from the International News Service wire, nor did he communicate any such news to any office of The Associated Press or to any of its members or to any one whomsoever.

E. FRANK WILSON.

Sworn to and subscribed before me this 19th day of January, 1917.

[SEAL.]

EDWARD U. ROTH,
Notary Public, No. 159, New York County.

133 Affidavit of Melville E. Stone.

United States District Court, Southern District of New York.

THE ASSOCIATED PRESS, Complainant,
against

INTERNATIONAL NEWS SERVICE, Defendant.

STATE OF NEW YORK,
County of New York, ss:

Melville E. Stone, General Manager of The Associated Press, being duly sworn, deposes and says that it is intimated or stated in some of the affidavits on behalf of the defendant herein, that it is customary for the telegraph operators of rival news-agencies to obtain tips on dispatches received by the operators of other news-agencies either by obtaining such information from such other operators or by listening to the dispatches as received over the wires, and that in many cases the instruments of such opposition news-agencies are in the same room so that it is possible for the expert operator receiving the news at one instrument to hear and read the news which is received over the other instruments.

One instance only of that kind has been referred to in the affidavits, to wit: the instance in which it was claimed that the news of the sinking of the Lusitania was taken by the representative

of The Associated Press as it was received over the wire of the defendant which happened to be in the same room at Syracuse, as appears from the affidavit of E. Frank Wilson, as filed herewith.

That the statement made in said affidavit in respect to the
134 Lusitania item has been fully denied by the affidavits of Wilson.

The situation at Syracuse was a peculiar and unusual one because during the Barnes-Roosevelt trial a single room had been set apart in the courthouse for the use of the various telegraph operators representing the telegraph companies, news agencies and the newspapers. The deponent further says that such situation was entirely unusual; that some years ago, the complainant found that the defendant and other competing news agencies were in the habit of obtaining the news which was received by the complainant's telegraph operators in the office of Associated Press members through the telegraph operators of such other news agencies occupying the same room or the same building, and that it was practically impossible to prevent it if such other operators were permitted to occupy the same office or the same building. If they were occupying the same room, expert telegraphers could read the news as it was received over the instruments of The Associated Press; if occupying other rooms in the same buildings, the moment any news of any important event was received over The Associated Press wire it would be likely to spread through the working force of the newspaper and it was almost impossible to prevent its reaching the ears of representatives of the competing news-agencies. In consequence, and in order to prevent this practice, the complainant established a rule some years ago prohibiting its members from permitting the telegraph operators or representatives of any other news agencies to send or receive news or occupy any room or office in the building where such newspaper was published, and that that rule has been rigidly enforced.

MELVILLE E. STONE.

Subscribed and sworn to before me this 19th day of January, 1917.

[SEAL.]

EDWARD U. ROTH,
Notary Public, No. 159, New York County.

135 Replying to Affidavit of H. E. Leary (p. 82).

Affidavit of Kent Cooper.

United States District Court, Southern District of New York.

THE ASSOCIATED PRESS, Complainant,

against

INTERNATIONAL NEWS SERVICE, Defendant.

Affidavit.

CITY, COUNTY AND STATE OF NEW YORK, ss:

Kent Cooper, being duly sworn, deposes and says:

I am Chief of the Traffic Department of The Associated Press and have been such, either under that title or the prior title of the same office, which was Superintendent of Traffic, since February 1, 1912; prior to that time I was Traveling Inspector of The Associated Press. I entered the service of The Associated Press December 1, 1910, and have been continuously in that service ever since.

As Superintendent of Traffic and Chief of the Traffic Department, my duties have included the supervision of all telegraph operators, and I am familiar with and directly responsible for all the rules and regulations relating to operators.

I have read the affidavit of Henry E. Leary in this proceeding. During such portion of Leary's service in The Associated Press as I was, as aforesaid, Superintendent of Traffic and Chief of the Traffic Department, he was under my supervision and subject to the rules laid down by me.

136 I have noted the statement of said Leary, to wit:

"Affiant further states that Associated Press operators are instructed verbally and by means of printed rules and regulations that they are supposed to transmit over the A. P. wires to the A. P. headquarters any and all news which may come into their possession, and during all the period of his employment by The Associated Press he never heard that this news was supposed to exclude news furnished by International News Service or any other news agency."

There is not and never was, in the said department, any rule, printed or otherwise, such as Leary describes or intimates. The only rule referring to the duties of an operator in the matter of giving information on news stories is that of the General Manager, Mr. Stone, appearing in the affidavit of Arthur W. Copp in this proceeding, and which refers only to local news to which we are entitled from our members.

It is of course the practice of Associated Press operators, when learning in any legitimate way of a rumor of an event or happen-

ing anywhere to send to their controlling bureau points the facts of the rumor.

Any charge that operators were expected or permitted to obtain such information or rumor by inducing any breach of a contract or confidential relation or to use information which they knew to have been communicated under circumstances of such a breach, is wholly untrue, and any operator discovered doing it would be discharged. Mr. Leary gives no incident when such was done and this statement is made merely to preclude such an inference being drawn from his affidavit. It is, of course, possible that in rare cases it may have happened that a correspondent of The Associated Press may have heard of some such rumor or report from the representative of some other news agency and may have transmitted the report to the central office of The Associated Press without divulging that fact, but any such instances would be very rare, for the reason that the correspondents and employees of The Associated Press are so situated that they do not come in contact with the employees of the other news agencies. No such practice exists, and if any instances have occurred they have been wholly unauthorized and without the knowledge or approval of the management of The Associated Press.

The only use of rumors is for the information of our correspondents in the district where the event is reported to have happened. Any story sent to the members of The Associated Press is based solely upon news obtained by these correspondents from original sources, and if no such information can be obtained, no story is sent out. This is the definite and invariable rule of The Associated Press, and any employee discovered violating it would be dismissed from the service. Such correspondents and representatives have not been authorized to use the news despatches, either in whole or in part, before or after publication, of any rival or competing news-gathering association, or of any newspaper not represented by membership in The Associated Press, and so far as I know, The Associated Press has not done so. When any rumor or current report is received, The Associated Press investigates the subject through its own independent sources, and any despatches it sends out are based upon its own investigation and the product of its own enterprise and expense.

KENT COOPER.

Sworn to before me this 22nd day of January, 1917.

[SEAL.]

EDWARD N. ROTH,

Notary Public, No. 159, New York County.

138 Replying to the Affidavits of K. R. Cochran (p. 86) and C. E. Cox (p. 93).

Affidavit of Arthur W. Copp.

United States District Court, Southern District of New York.

THE ASSOCIATED PRESS, Complainant,

against

INTERNATIONAL NEWS SERVICE, Defendant.

STATE OF NEW YORK,

County of New York, ss:

Arthur W. Copp, being duly sworn, deposes and says: I am and have been for twenty-two years last past in the service of news-gathering organizations and have been an employee of The Associated Press since its organization. I have been engaged as a telegraph operator, as a news correspondent, as a news editor and as Superintendent of division for the said organization, and I am familiar with all the methods employed by The Associated Press in the gathering and handling of news.

From September, 1911, to January, 1916, I was Superintendent of the Western Division of The Associated Press, with headquarters in San Francisco, California.

I have read the affidavits of Kent R. Cochran and Carlyle E. Cox in this proceeding. At all times mentioned in the said affidavits I was Superintendent of the Western Division of The Associated Press.

I have noted the statement in the affidavit of Carlyle E. Cox that Mr. Stone, General Manager of The Associated Press, had sent a notice or a bulletin to the operators of The Associated Press. To make clear the content and purposes of that order I quote it here in full:

"General Order No. 353.

"New York, Aug. 18 [1913].

"Operators who copy the report in newspaper offices at non-bureau points should be alert to see that The Associated Press is protected promptly when big news events occur in their cities. They should immediately call to the attention of editors the necessity of a bulletin, and if a bulletin is not quickly offered, should themselves send a message of information to their controlling bureau.

"Bureau points will make note of such assistance on the part of operators and it will be recognized in the record of their service.

MELVILLE E. STONE,

General Manager."

If Mr. Cox intended to intimate that such an order instructed or permitted the inducing of any breach of a confidential relation in respect to the news of a competing news service, I wish to say that the above order was not intended to refer nor can it conceivably be construed as referring to any such practice. As a matter of fact, as the content of the order clearly shows, it did not refer to news originating outside of the several cities where such operators are located; it only referred to local news which the members of The Associated Press in whose offices these non-bureau operators were situated are required to furnish to The Associated Press. I wish to further say that Mr. Cochran was not an employee either of the International News Service or of any subscriber thereto, but was an employee of the Western Union Telegraph Company.

140 I have noted the intimation in the affidavits of Mr. Cox and Mr. Cochran that it was the practice of The Associated Press to rewrite stories to be sent to the members of The Associated Press based upon the strength of tips received from operators. My duties as Superintendent were chiefly concerned with the supervision of the news report of each day. I deny positively that any such practice was employed by the editors of The Associated Press.

Any report of an event or happening sent out by either Cox or Muggeridge was addressed to the bureau at San Francisco. If the News Editor at San Francisco considered the information of real value, he would then send a message to The Associated Press correspondent in the district where the event was reported to have happened. Upon receipt of such message, such correspondent would independently investigate the story from original sources, and any story sent to the members of The Associated Press would be based solely upon the strength of such investigation and gathered from original sources.

I wish further to say that I personally more than once, while Superintendent of Western Division of The Associated Press at San Francisco, gave explicit instruction to employees connected with that office never in any circumstance to distribute either locally or otherwise stories not based upon the sole strength of independent investigation from original sources made by Associated Press reporters.

ARTHUR W. COPP.

Subscribed and sworn to before me this 22nd day of January, 1917.

[S.L.A.L.]

EDWARD U. ROTH,

Notary Public, New York County, No. 159.

141

Affidavit of Jesse Crosswy.

United States District Court, Southern District of New York.

THE ASSOCIATED PRESS, Complainant,

against

INTERNATIONAL NEWS SERVICE, Defendant.

STATE OF NEW YORK,

County of New York, ss:

Jesse Crosswy, being duly sworn, deposes and says: I am Division Traffic Chief of the Eastern Division of The Associated Press and have read the affidavits of Kent R. Cochran and Carlyle E. Cox in this proceeding. At all times mentioned in these affidavits I was Chief Operator in the San Francisco office of The Associated Press and had immediate supervision of Mr. Cox and Mr. Muggeridge, mentioned in the aforesaid affidavits.

The only orders or instructions coming to either Mr. Cox or Mr. Muggeridge would have come through me. At no time were Mr. Cox or Mr. Muggeridge or any other operator in my division instructed, expected or permitted to induce any employees of a competing news service to any breach of the confidential relation which existed between them and their employers in respect to the news of such service.

I have noted the statement in Mr. Cochran's affidavit, to wit:

"In some of the instances referred to in this affidavit, the matter sent out by Cox and Muggeridge to The Associated Press, was
142 more than a tip, as defined above, and was such an extended report of the matter that The Associated Press could write the story and send it out over their wires from the tip itself, and without making any independent inquiry or ascertaining any additional facts."

All reports sent by either Mr. Cox or Mr. Muggeridge while employed in the office of the San Francisco Call & Post were sent to the San Francisco office where I was the Chief Operator. Mr. Cochran's statement that tips sent by Mr. Cox or Mr. Muggeridge would be acted upon from the office in Chicago is not true. The fact is that all reports sent out by operators in the Western Division would be acted upon solely by the San Francisco office, where I was Chief Operator.

Owing to my intimate connection with the news report passing through the San Francisco office, I know that stories were never sent to The Associated Press members based in whole or in part upon information originating in the International News Service, either before or after publication.

JESSE CROSSWY.

Subscribed and sworn to before me this 20th day of January, 1917.

[SEAL.]

WM. H. BRUDER,

Notary Public, Bronx County, No. 35.

Certificate filed in New York County No. 45.

143 C. Replying to the Charge that Complainant Rewrites Defendant's News from Newspapers Contained in Defendant's Group No. 4.

Replying to Affidavit of E. R. Sartwell.

Affidavit of Jackson S. Elliott.

United States District Court, Southern District of New York.

THE ASSOCIATED PRESS, Complainant,

against

INTERNATIONAL NEWS SERVICE, Defendant.

STATE OF NEW YORK.

County of New York, ss:

Jackson S. Elliott, being duly sworn, deposes and says: I am in charge of The Associated Press service in Washington, District of Columbia. I entered the service of The Associated Press in Washington on November 1, 1903, serving in various capacities until September 1, 1912, when I became Superintendent of the Eastern Division with offices in New York. In June, 1915, I returned to Washington as Chief of that bureau, which position I now occupy in addition to being Superintendent of the Eastern Division.

I have read the affidavits of Edward R. Sartwell in this proceeding; I employed Mr. Sartwell in May, 1912. During all the time of Mr. Sartwell's employment, he was a reporter and never had personally to do with the sending or editing of news dispatches.

144 I have noted the statement in Mr. Sartwell's affidavit, to wit:

"Very frequently, these tips sent out were sufficiently complete as to the nature and character of the story and its point of origin to enable the central office of the Association to whom the tip was sent to rewrite the information, and then send it out over its own wires to its own customers, as its own bulletin, without making an independent investigation."

I deny positively that at any time, either in the Washington office or in the New York office (i. e., the "central office" which is referred to by Mr. Sartwell), both of which are now in the division of which I am Superintendent, have stories been written either in whole or in part upon the strength of tips taken from the International News

Service either before or after publication. All dispatches sent over The Associated Press wires have been based solely upon the strength of independent investigation and gathered from original sources.

It is the definite, invariable and well understood policy of The Associated Press to base no stories upon tips received from opposition services. This regulation prevents even the sending to our members of the mere statement of the event as it appeared in the tip. I have communicated this regulation to every man that I have employed, and, although I cannot at this time remember distinctly the circumstances of such communication to Mr. Sartwell, the above policy must have been followed in his case.

More tips of news appearing in opposition services come to the Washington office of The Associated Press than to any other office in the country. It is the invariable practice to my personal knowledge for the editors in charge, who prepare the stories based upon the news referred to in such tips, to base such stories upon the sole
145 strength of information gathered from original sources in the City of Washington by the reporters of The Associated Press.

If they are unable to obtain such information from such original sources, it is the invariable practice to send out no story at all, and this is true to my personal knowledge.

I have noted the further statement in the affidavit of Mr. Sartwell, to wit:

"While I was in the Washington Bureau of The Associated Press, it was the custom of the employees of that bureau to obtain, as soon as they were printed, the various newspapers published and circulated in the city of Washington, among others, the Washington Herald, a newspaper which at that time was a subscriber to the news service of the International News Service, or its predecessor, the National News Association; and the Washington Times, which was a subscriber to the news service of the United Press.

"Both these papers were carefully read by the staff and such items of news taken therefrom, although not originating with The Associated Press, and were rewritten, and sent out to the members of The Associated Press, whenever the stories were of sufficient importance, in the judgment of the employees of the Washington Bureau of The Associated Press, to warrant their being sent out."

In connection with this statement, it is natural, as a matter of routine, that the editors of The Associated Press would obtain as soon as they were printed all the various newspapers published or circulated in the City of Washington, but I deny positively, on the strength of my intimate connection with, and knowledge of, the Washington Bureau that any stories originating in the International News Service, or appearing in the Washington Herald or the
146 Washington Times, were ever rewritten and sent out to the members of The Associated Press.

As above stated, I employed Mr. Sartwell and I also appointed L. C. Probert, as manager of the news desks, to whom Sartwell was immediately responsible during the entire term of his employment. I informed every man whom I employed that it was a definite and

invariable regulation of The Associated Press that at no time should any story appearing in opposition news services be rewritten.

JACKSON S. ELLIOTT.

Subscribed and sworn to before me this 20th day of January, 1917.

[SEAL.]

WM. H. BRUDER,

Notary Public, Bronx County, No. 35.

Certificate filed in New York County, No. 45.

147 Replying to Affidavits of W. M. Baskervill (p. 101) and J. M. Fletcher (p. 110).

Affidavit of Paul Cowles.

United States District Court, Southern District of New York.

THE ASSOCIATED PRESS, Complainant,

against

INTERNATIONAL NEWS SERVICE, Defendant.

STATE OF NEW YORK,

County of New York, ss:

Paul Cowles, being duly sworn, deposes and says that he is Superintendent of the Central Division of The Associated Press.

That from the years 1909 until 1912 he was Superintendent of The Associated Press for the Southern Division, and as such was stationed at Atlanta, in the State of Georgia.

That he has read the affidavit of William M. Baskervill in this proceeding. That he knows the said Baskervill, and that the said Baskervill was employed by him in the Atlanta office of The Associated Press. That during this period, the general instructions of the employees in the said Atlanta office of The Associated Press forbade their taking any news from the Atlanta Georgian, and incorporating it in the news service of The Associated Press, and, to the best of his knowledge and belief the said Baskervill never

148 violated this rule, and if he did, it was in direct contravention of the general instructions given to him.

PAUL COWLES.

Sworn to before me this 18th day of January, 1917.

[SEAL.]

EDWARD U. ROTH,

Notary Public No. 159, New York County.

Affidavit of C. G. Marshall.

United States District Court, Southern District of New York.

THE ASSOCIATED PRESS, Complainant,

against

INTERNATIONAL NEWS SERVICE, Defendant.

Affidavit.

STATE OF NEW YORK,

County of New York, ss:

C. G. Marshall, being duly sworn, deposes and says: that I am news editor of the Southern Division of The Associated Press under Superintendent Arthur W. Copp, with headquarters at Washington, D. C. I have read the affidavit of William M. Baskervill in this proceeding. During all the time of his employment with The Associated Press he was under my direct supervision, while I was news editor of The Associated Press with office in Atlanta, Georgia. 149 until the time when he succeeded me as such news editor in 1913. I have noted his statement, to wit:

"It has been, to my knowledge, the universal custom among newspaper men and among news services, to utilize the facts which are set forth in any published story, to rewrite that story, if they see fit, and to send it to whom, and as they see fit."

I deny it is the custom or practice of The Associated Press to utilize the facts which are set forth in a published story originating in opposition news services to re-write that story and send it out to the members of The Associated Press.

Employees of The Associated Press are specifically instructed never to do so in a single instance. During the early part of Mr. Baskervill's connection with The Associated Press I had a great deal to do with his training in the rules and methods of The Associated Press and to my personal knowledge he became familiar with this rule. I watched Mr. Baskervill's work very carefully and so far as I know he never violated this rule.

C. G. MARSHALL.

Sworn to before me this 20th day of January, 1917.

[SEAL.]

WM. H. BRUDER,

Notary Public, Bronx County, No. 35.

Certificate filed in New York County, No. 45.

150 Replying to Affidavit of William Schwinger (p. 106).

Affidavit of Henry L. Rennick.

United States District Court, Southern District of New York.

ASSOCIATED PRESS

VS.

INTERNATIONAL NEWS SERVICE.

STATE OF ILLINOIS.

County of Sangamon, ss:

I, Henry L. Rennick, being duly sworn, do make affidavit as follows:

From August 20, 1916, until September 20, 1916, or thereabouts, I was employed as night city editor in the office at Chicago of the Associated Press, engaged in the writing of news for transmission of the wires of the Associated Press.

That during that time I acted under the explicit instructions of the night news editor, B. G. Wyrick, and the only morning news editor, E. L. Powell, both of whom had instructed me that no news matter was to be rewritten from the Chicago Examiner without verification from other sources, in which event the news was to be handled by me as secured from the other sources.

That during this period of time when I was employed in said position I obeyed those orders strictly.

HENRY L. RENNICK.

Subscribed and sworn to before me this nineteenth day of January, nineteenth hundred and seventeen.

[NOTARIAL SEAL.]

L. E. LAWLEY,

Notary Public.

My Commission Expires January 25, 1919.

151 Replying to Affidavit of Fred Harvey (p. 108).

Affidavit of Harold Martin.

United States District Court, Southern District of New York.

THE ASSOCIATED PRESS, Complainant,

against

INTERNATIONAL NEWS SERVICE, Defendant.

STATE OF NEW YORK.

County of New York, ss:

Harold Martin, being duly sworn, deposes and says that he is the Acting Superintendent of the Eastern Division of The Associated

Press, with offices at New York City; that he resides at Forest Hills, Long Island; that he has been Acting Superintendent of the Eastern Division for about two years and that prior thereto he was News Editor of the Eastern Division for about five years; that he has been in the employ of The Associated Press ever since 1898; that during all of this time he has been familiar with the practice of The Associated Press with reference to the matters stated in the affidavit of Fred Harvey, verified January 12, 1917, excepting that for about six or eight years during his employment all prior to 1906 he was in the Foreign Service and was not directly cognizant of the said matters.

During the period referred to in the said affidavit of the said Fred Harvey one Mr. Thompson was Superintendent of the local office of The Associated Press and I was News Editor at the
152 said office and the matters referred to in the said affidavit were directly under my jurisdiction.

During all of the said time, with the exception of the aforesaid period when I was in the foreign service (and during which as aforesaid I was not directly cognizant of said matter), it was the rule and custom of The Associated Press to my own personal knowledge that no matters published in any non-Associated Press papers should be re-written for publication in The Associated Press service.

If the said Harvey did indulge in the practice which he states in the said affidavit, it was contrary to the established instructions and practice of The Associated Press and contrary to his duty as an employe thereof and without my knowledge or consent and, owing to the position I held at the time he refers to and the scope of my duties in that position, it would have been impossible for him to have engaged in such practices by any authority of the Association.

Furthermore, it is not true, as the said Harvey alleges, that the original "copy" of any stories transmitted over the wires of the Association were filed with the Superintendent of the local office, and the routine of the office has never included such filing with such Superintendent, but the said original copy has been and is placed in the general record filing room in filing cabinets under its respective dates for office reference. Further, under the routine of the filing system of the office as it in fact existed and exists such copy would not come to the cognizance of the said Superintendent through any such transmittal as the said Harvey alleges; but, as aforesaid, no such "copy" could have existed consistently with the custom, practice and regulations of the Association or by authority of its officers. The only copy received by the Superintendent, as a matter of routine office regulation, was at the time referred to by the said Harvey and always has been during my experience, matter received by The Associated Press over its wires from points
153 outside of New York City; it never included the "sent" report from New York City, in which category the filing referred to by said Harvey would fall.

I have from time to time explained to employees that they should under no circumstances take for rewriting or republication any story of foreign or domestic origin from papers not mem-

bers of The Associated Press or from papers conducting a news service of their own.

The record of The Associated Press relative to the service of the said Harvey in its employ is as follows:

Entered service of The Associated Press May 11, 1909.

Night local reporter, New York, May 11, to November 27, 1909.

*Havana and Pony Editor, New York, November 28, 1909, to December 18, 1909.

Night Local Reporter, New York, December 19, 1909, to January 15, 1910.

*Havana and Pony Editor, New York, January 16, 1910, to April 9, 1910.

He left the service April 9, 1910.

(*i. e., Editor in charge of a condensed news service transmitted by telephone or over the commercial wires.)

The aforesaid Thompson is not in this country, and as the deponent believes, has not been for over a month, but is and has been in England.

HAROLD MARTIN.

Subscribed and sworn to before me this 22nd day of January, 1917.

[SEAL.]

EDWARD U. ROTH,

Notary Public, No. 159, New York County.

154 Replying to Affidavits of H. V. Hogan (p. 111) and L. E. Thrush (p. 114).

Affidavit of Paul Cowles.

United States District Court, Southern District of New York.

THE ASSOCIATED PRESS, Complainant,

against

INTERNATIONAL NEWS SERVICE, Defendant.

STATE OF NEW YORK,

County of New York, ss:

Paul Cowles, being duly sworn, deposes and says that he is Superintendent of the Central Division of The Associated Press with headquarters at Chicago.

That he has read the affidavit of Homer V. Hogan in this proceeding; that the said Hogan was employed in the Chicago office of The Associated Press in 1912, as telephone reader of the abbreviated night service of The Associated Press to certain newspapers, and as such telephone reader had no opportunity whatever to prepare dispatches for The Associated Press, but his sole duty was to read dispatches furnished him by other employees.

PAUL COWLES.

Sworn to before me, this 18th day of January, 1917.

[SEAL.]

EDWARD E. ROTH,

Notary Public, No. 159, New York County.

155

Affidavit of Paul Cowles.

United States District Court, Southern District of New York.

THE ASSOCIATED PRESS, Complainant,

against

INTERNATIONAL NEWS SERVICE, Defendant.

Affidavit.

STATE OF NEW YORK.

County of New York, ss.:

Paul Cowles, being duly sworn, deposes and says that he is Superintendent of the Central Division of The Associated Press, with headquarters in Chicago; that he has read the affidavit of Lloyd E. Thrush in this proceeding relating to a practice of said Thrush as an employe of The Associated Press of rewriting news items appearing in the Chicago American and the Chicago Examiner, which are not represented in The Associated Press, said news items being rewritten for the use of The Associated Press service; that all matters pertaining to the handling of news in the said Central Division *was* [were] under the supervision of and subject to the instructions given by the deponent; that any such practice, if engaged in by Mr. Thrush, was in direct violation of the whole policy of The Associated Press and in violation of the general instructions given to employes of The Associated Press in the said Central Division; that the only authorized use of news items appearing in newspapers not represented by membership in The Associated Press was for the sole and only purpose of obtaining bare information that a certain event was said to have happened, whereupon the representatives of The Associated Press would undertake an independent investigation of the facts and write the story solely upon

the strength of this independent investigation; and that
156 under the instructions given to employes neither the details of a happening nor the bare statement of the fact as appearing in the Chicago American and the Chicago Examiner could be incorporated in the despatches of The Associated Press news service, and that under such instructions despatches in reference to such happening appearing in The Associated Press news service could be based solely upon the strength of independent investigation; that Mr. Thrush was employed in the Chicago office as a temporary employe, and that during the course of such employment there was a period of less than a month during which his duties were such that he could have engaged in the practices to which he refers in his affidavit; that if Mr. Thrush, because of his brief con-

nection with The Associated Press, either misunderstood its policy and instructions or wilfully violated them, such news items as he claims to have re-written for other papers were submitted to and passed under the supervision of regular employes of The Associated Press; that deponent has had an examination made in the last twenty-four hours of all stories written by Thrush, all of which stories are now on file in the Chicago office of The Associated Press; that such examination, as reported by H. W. Blakeslee, News Editor of the Central Division of The Associated Press, discloses the fact that in all cases the stories appearing in the Chicago American and The Chicago Examiner were used for the sole purpose of obtaining the bare information that such and such an event had occurred, and that all stories sent out over the wires of The Associated Press were based solely upon the strength of independent investigation by The Associated Press.

PAUL COWLES.

Subscribed to and sworn before me this 19th day of January, 1917.

[SEAL.]

EDWARD U. ROTH,
Notary Public, No. 159, New York County.

157

Affidavit of Basil G. Wyrick.

United States District Court, Southern District of New York.

ASSOCIATED PRESS

VS.

INTERNATIONAL NEWS SERVICE.

STATE OF ILLINOIS,

County of Cook, ss:

Basil G. Wyrick, being first duly sworn, on oath says that he is the night news editor for the central division of the Associated Press in the Chicago office; that he has charge of the news service for the Associated Press at night in the Central Division, including the outgoing news from Chicago. Affiant states that he instructed all the employees of the Associated Press who prepared news items or news dispatches originating in Chicago not to take any news items or news dispatches from either the Chicago Examiner or the Chicago American, and further that his instructions were that when such items were found in either of said papers where the same were purchased from the news stands on the streets that any such news items or dispatches were to be verified from other sources before being used by the Associated Press and were to be prepared in accordance with information obtained from such other sources.

Affiant further states that one Lloyd E. Thrush, who was formerly in the employ of the Chicago office of the Associated Press, and whose work included the preparation of news items originating

158 in Chicago and vicinity, and who is now, as affiant is informed and believes, in the employ of the Chicago Examiner, upon assuming his duties with the Associated Press under the direction of affiant, was specifically and repeatedly instructed not to take any news or items of news from the various editions of the Chicago American or Chicago Examiner, and that any information obtained in the first instance from either of said sources was not to be used until such news should be obtained from other sources, and in such case the same should be prepared in accordance with the information so obtained from such other sources.

BASIL G. WYRICK.

Subscribed and sworn to before me this 19th day of January, A. D. 1917.

[NOTARIAL SEAL.]

EDWIN L. JOHNSON,
Notary Public.

159

Amendment of Bill of Complaint.

United States District Court, Southern District of New York.

E. 14-59.

THE ASSOCIATED PRESS, Complainant,

against

INTERNATIONAL NEWS SERVICE, Defendant.

Amendment of Bill of Complaint.

To the Honorable the Judges of the District Court of the United States for the Southern District of New York:

Your orator by leave of the court in that behalf first had and obtained amends its Bill of Complaint as follows:

First. After Article II add the following:

"IIa. The amount involved in this suit and the damage to which the complainant is being subjected by the matters complained of is in excess of Three thousand dollars (\$3,000)."

Second. In Article IX amend paragraph (a) so as to read as follows:

"(a) It has arranged with telegraph editors and other employees of newspapers owned or represented by members of complainant, by which for consideration regularly paid they have communicated to it news received by them from complainant and also local news gathered by such members for the use of complainant's members as required by the By-Laws, as aforesaid, as soon as the same was received, and before its publication by complainant's members."

Third. Amend paragraph- (a) and (b) of Article 2 of the Prayer so as to read as follows:

"(a) From inducing or procuring any telegraph editors or other employees or agents of any of the complainant's members or of any newspaper or newspapers owned or represented by them or any of them, or any such members or newspapers, to communicate to defendant or to permit defendant to take or appropriate, for consideration or otherwise, any news received from complainant or gathered by such members for the use of complainant's members as required by the By-Laws of complainant, and from purchasing, receiving, selling, transmitting, or using any such news.

"(b) From purchasing, obtaining or receiving, or causing to be purchased, obtained or received for it by anyone, directly or indirectly, any of the news furnished by the complainant to its members, or gathered by such members for the use of complainant's members as required by the By-Laws of complainant, and from selling, transmitting, distributing or using the said news."

Wherefore your orator prays as it has before prayed in its original Bill of Complaint.

By STETSON, JENNINGS & RUSSELL,

Its Solicitors.

161 STATE OF NEW YORK.

County of New York, ss:

Melville E. Stone, being duly sworn, deposes and says: That he is the Secretary and General Manager of The Associated Press, the complainant above named; that he has read the foregoing amendment to the Bill of Complaint and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters stated to be alleged upon information and belief and that as to those matters he believes it to be true.

MELVILLE E. STONE.

Sworn to before me this 6th day of February, 1917.

[SEAL.]

WM. H. BRUDER,

Notary Public, Bronx County, No. 35.

Certificate filed in New York County No. 45.

162 *Answer to Amended Complaint.*

United States District Court, Southern District of New York.

ASSOCIATED PRESS, Plaintiff,

against

INTERNATIONAL NEWS SERVICE, Defendant.

To the Honorable the Judges of the United States District Court for the Southern District of New York:

The defendant above named, by William A. de Ford, its solicitor, answering the amended complaint herein, alleges upon information and belief as follows:

First. It denies that it has any knowledge or information sufficient to form a belief as to each and all of the allegations stated and contained in the paragraph of the complaint numbered and designated III and IV.

Second. It denies that it has any knowledge or information sufficient to form a belief as to each and all of the allegations stated and contained in the paragraph of the complaint numbered and designated V, except that it admits that a service through which world-wide news is collected and distributed is essential to the conduct of a modern newspaper, and that because of the expense of collecting such news the only practical and economical method of obtaining the same is either by co-operation among a number
163 of newspaper proprietors in the work of collecting and distributing the same, and the division of the expense thereof, or by the purchase of such news from some agency regularly engaged in such business.

Third. It denies that it has any knowledge or information sufficient to form a belief as to each and all of the allegations stated and contained in the paragraph of complaint numbered and designated VI, except the allegation to the effect that it is an essential part of the plan of operation of the complainant that the news collected by it shall remain confidential and secret until its publication has been fully completed by all of complainant's members, which allegation, upon information and belief, it denies.

Fourth. It denies that it has any knowledge or information sufficient to form a belief as to each and all of the allegations stated and contained in the paragraph of the complaint numbered and designated VII, except that it admits that there are many newspapers in the United States not represented by membership in complainant which newspapers purchase their news service from news agencies other than complainant, and that such newspapers compete with certain newspapers owned or represented by members of complainant, and except that it also admits that there exist in the United States news agencies other than complainant, and it denies that it has induced or endeavored to induce members of complainant to withdraw from membership in complainant and to purchase defendant's service by other than fair and honorable means of competition.

Fifth. It denies each and all of the allegations stated and contained in the paragraph of the complaint numbered and
164 designated IX, except that it admits, on information and belief, that in frequent cases clients or customers of defendant have been able to publish certain items of news lawfully collected and transmitted by defendant by means of its own instrumentalities simultaneously with or prior to the publication of such items or news by complainant's members, and it alleges that such clients or customers of defendant have thus been able to publish such items of news simultaneously with or prior to its publication by complainant's members wholly and entirely because of the superior facilities of defendant and its more efficient methods of transmission.

Further answering the subdivision of said paragraph of the com-

plaint marked or designated "c," defendant alleges on information and belief that it is a well known and practically universal custom for publishers of newspapers in this country and abroad to obtain and read editions of newspapers published by others than themselves, and for news agencies in this country and abroad, including defendant and complainant, to obtain and read editions of newspapers published by persons or corporations other than their members, customers, subscribers or clients, and to obtain therefrom various items of news, and for such publishers of newspapers to re-write such items of news therein contained which they deem of sufficient importance to interest their subscribers, and to publish the same, sometimes with and sometimes without additional verification, and without revealing the original source from which such news items were obtained, and for such news agencies, including complainant, to obtain from the newspapers thus obtained and read by them, various items of news appearing therein, which items such news agencies rewrite and
 165 distribute to their members, customers, subscribers or clients, sometimes with and sometimes without additional verification or investigation, and without revealing the original source from which such information was obtained.

Sixth. It denies each and all of the allegations stated and contained in the paragraphs of said complaint numbered and designated X and XI.

Seventh. It denies each and all of the allegations stated and contained in the paragraph of the complaint numbered and designated XII, except it admits that the British, French, Canadian, Portuguese and Japanese governments have issued orders prohibiting defendant from using any cable or telegraph lines running therefrom, and except that it denies that it has systematically or otherwise pirated, or is still systematically or otherwise, pirating any of complainant's news, or anything whatsoever that is the property of complainant or in which complainant has any property right.

Eighth. It denies any knowledge or information sufficient to form a belief as to each and all of the allegations stated and contained in the paragraph of the complaint numbered and designated XIII, except it admits that competition exists to some extent between complainant and defendant and that some of defendant's customers or clients are members of complainant, and except it denies that defendant obtains fees from its clients without cost or legitimate effort, and it alleges that the fees which it receives from its clients are in compensation to it for the distribution to such clients of items of news which have been gathered by it at great cost and labor to itself, and by means of and through its own instrumentalities.

Ninth. It denies each and all of the allegations stated and contained in the paragraph of the complaint numbered and designated XIV.

166 Tenth. It denies each and all of the allegations stated and contained in the paragraph of complaint numbered and designated XV except as to what complainant is advised and believes, and as to that allegation, it denies that it has any knowledge or information sufficient to form a belief.

Eleventh. On information and belief, it denies each and all of the allegations stated and contained in the paragraph of the complaint numbered and designated XVI.

Further answering the complaint herein, and for a first separate and distinct defense the defendant alleges:

Twelfth. That for each and every of the alleged injuries, or threatened injuries set forth in the complaint, the complainant has a complete and adequate remedy at law.

Further answering the complaint herein, and for a second separate and distinct defense the defendant alleges on information and belief:

Thirteenth. The defendant is a corporation organized and existing under and pursuant to the laws of the State of New Jersey. Its business now is, and at all times since its organization has been, (a) obtaining and collecting, by means of its own instrumentalities, from sources all over the world, items of news, and artistic and literary material for publication by its clients and customers hereinafter called "subscribers," (b) preparing for publication, selling and distributing the before mentioned items of news, and artistic and literary material, to proprietors of news ticker services and to proprietors of newspapers, magazines and periodicals published and circulated in the United States, who will hereinafter be referred to as "subscribers."

It has its own representatives and correspondents in the 167 principal cities of the United States and abroad, and through these representatives and correspondents, and by means of reciprocal arrangements with news agencies located in foreign countries, it gathers the important news items of the world. It causes the news thus gathered to be promptly transmitted by telegraph, telephone or other appropriate instrumentalities to its subscribers; and such information or news is so furnished to such subscribers under an express understanding and agreement with such subscribers that the same will not be furnished or communicated by them to any other person or persons, and that it will remain confidential and secret until it has been regularly published by them in their ticker service, newspaper, magazine or periodical as the case may be.

Fourteenth. The complainant is a New York corporation, and claims to be a co-operative organization; it was incorporated in the year 1900 under the Membership Corporation Law of the State of New York, and its members have been and are proprietors or representatives of various newspapers, both morning and evening, published throughout the United States. It is engaged in the business of collecting world-wide news and furnishing the same to its members for publication in the newspapers owned or represented by them.

Fifteenth. At the present time the defendant furnishes the news collected by it as hereinbefore stated, to about 400 newspapers of all varieties and shades of political opinion, and news policy, published in the United States, Canada and abroad. The cost of collecting and distributing the local and foreign news, which the defendant fur-

nishes to its subscribers is very great, amounting to many thousands of dollars annually.

The value of the news thus collected by defendant and furnished to its subscribers largely depends upon the promptness of its transmission, and it is essential that such news shall be transmitted to its subscribers as early or earlier than similar information can be transmitted to competing newspapers by other news services, and that the news collected by defendant and furnished to its subscribers shall not be furnished to newspapers which do not subscribe to defendant's service, and which do not pay therefor. It is also essential to the value of defendant's news-service that the news collected by it and transmitted to its subscribers shall remain confidential and secret until publication thereof has been fully accomplished by the subscriber to whom it is so furnished, otherwise the news so collected by defendant and furnished to its subscribers at great labor and expense would be available to competing news services and to newspapers which do not subscribe to its service, and could be obtained and used by them without expense or at a comparatively small cost, whereby the value and utility of defendant's news service would be seriously impaired and destroyed.

Sixteenth. Prompt knowledge and publication of world-wide news is essential to the conduct of a modern newspaper, and by reason of the enormous expense incident to the gathering and distribution of such news, the only practical way in which a proprietor of a newspaper can obtain the same is, either through co-operation with a considerable number of other newspaper proprietors in the work of collecting and distributing such news, and an equitable division with them of the expenses thereof, or by the purchase of such news from some existing agency engaged in that business.

The only co-operative organization for the collection and distribution of world-wide news is complainant. It furnishes news to its members only, and by means of its by-laws, specifically enacted for that purpose, its members are able to and do prevent many proprietors whose newspapers compete with newspapers published by them from obtaining membership in complainant, and the news service incident to such membership.

The news service of defendant is of great value to the proprietors of a great many newspapers and to the general public; but for the news service of defendant and that of similar news agencies other than complainant, many proprietors of newspapers throughout the United States would be unable to obtain and publish important items of news until after the same had been published by their competitors who are members of complainant, and when such information, because of such publication, had ceased to be news. And but for the service of defendant and news-agencies other than complainant the proprietors of newspapers represented by membership in the complainant would enjoy a practical monopoly in the prompt publication of news other than strictly local news, and the value and usefulness of all other newspapers throughout the United States would be greatly impaired, if not totally destroyed, and those of the news-

paper-reading public who do not read the newspapers published by complainant's members (of whom there are many), would be deprived of many important items of news, which otherwise would be available to them.

Seventeenth. For several years last past the complainant constantly and continuously has engaged and still is engaged in the practice of pirating and obtaining unlawfully, and in some cases corruptly, and without any substantial expense to itself, various items of news, which the defendant, by its own instrumentalities, and at a very great expense to itself, has gathered for the use of its subscribers, and the news items of defendant thus obtained by complainant have been, and still are systematically, continuously and

170 unlawfully appropriated by complainant and sold and transmitted to its members as its own, and under the pretense and false representation that it is news collected and obtained by complainant from its own original and independent sources, and for the news thus furnished to its members, complainant has collected and still is collecting from its members compensation.

The foregoing practice complainant has pursued and still is pursuing, by numerous and divers methods, among which are the following:

1. It has arranged with telegraph editors and other employees of newspapers owned or represented by subscribers of defendant, by which arrangement, for a consideration regularly paid, such editors and employees have communicated to complainant as soon as the same was received, and prior to its publication by defendant's subscribers, items of news and news "tips," which had been received by said subscribers from defendant.

It has, among others, an arrangement with one Cushing, a telegraph editor of the Cleveland News, with whom, it alleges, defendant has a similar arrangement with respect to complainant's news, by which arrangement, for a consideration of ten dollars a week, regularly paid to said Cushing by complainant, said Cushing furnishes and has furnished to complainant as soon as the same has been and is received by the Cleveland News, and prior to its publication by said Cleveland News, items of news and "tips" concerning items of news which defendant has furnished to said Cleveland News for its own use for publication, and which said news was and is furnished by defendant to said Cleveland News upon and under the understanding and agreement that such news was and is to remain confidential and secret until published by said Cleveland News; and the complainant, having so fraudulently and dishonestly obtained

171 such information and "tips," has in turn transmitted to its members the news items and "tips" concerning news so received, sometimes with, but generally without, additional verification or investigation and without revealing the sources from which such information was received.

2. As a part of its regular business, it causes its employees to obtain and read early editions of newspapers published by defendant's subscribers, and by other persons not members of complainant, and to read early bulletins published by such newspapers, for the use

of their readers or patrons, and the said employees of complainant, as a part of their regular duties, take from said newspapers and said bulletins items of news which have not theretofore been obtained by complainant, and in some cases copy, and in other cases re-write such news items, and transmit the same to some department of complainant, which department in turn, and likewise as a part of its regular business, transmits the same to complainant's members sometimes with, but generally without additional verification or investigation, and without revealing the original source from which such items of news were obtained. That this practice of the complainant is one of long standing, appears from an examination of the record in the case of Tribune vs. United Press Association, reported in Volume 116 of the Federal Reporter at page 126.

3. As a part of its regular business, complainant knowingly and wilfully causes and procures its employees, and especially those employees whose duties are to transmit or receive messages over telegraph wires, unlawfully, fraudulently and surreptitiously to obtain from telegraph wires carrying items of news collected and transmitted by defendant, or by other news services, or from telegraph editors of defendant or of other news services, items of news, or "tips" concerning such items of news, which have been gathered and are being transmitted by defendant and other news agencies, 172-3 to their subscribers, and to transmit the same to some department of complainant, which department in turn, likewise as a part of its regular duties, transmits such items of news, or such news "tips" to members of complainant, sometimes with, but generally without additional verification or investigation, and without revealing the source from which such information was obtained.

Eighteenth. That wherever the word "tip" is used or appears herein, it shall be deemed to connote information of a news event so outlining the main features of that event as to enable the person to whom it is given to identify the event, and to locate the place of its origin, thus enabling verification or amplification thereof.

Nineteenth. That by reason of the aforesaid unlawful and fraudulent conduct of complainant, it has no standing in a Court of Equity to be heard to complain of the acts and things alleged in its bill of complaint.

Wherefore defendant prays that the complaint herein may be dismissed, and that it may have a judgment herein against the plaintiff for the proper costs and disbursements herein, and that it may have such other and further relief as in the premises may unto this Honorable Court seem meet, just and proper.

WILLIAM A. DE FORD,

Solicitor for Defendant.

Office and Post Office Address, 140 Nassau St., New York City.

SAMUEL UNTERMYER,

HENRY A. WISE,

Of Counsel.

Affidavit of S. S. Carvalho.

United States District Court, Southern District of New York.

THE ASSOCIATED PRESS, Complainant,

against

INTERNATIONAL NEWS SERVICE, Defendant.

STATE OF NEW YORK,

County of New York, ss:

S. S. Carvalho, being duly sworn, deposes and says:

I reside at Plainfield, New Jersey. I am now, and have been continuously since February 25th, 1913, the president of the defendant above-named.

The defendant is a corporation organized and existing under and by virtue of the laws of the State of New Jersey. Its business now is, and has been at all times since its organization, that of obtaining, preparing for publication, selling and distributing news and artistic materials for publication in newspapers and periodicals published and circulated in the United States.

I have, as president of defendant since its organization, exercised general supervision of its financial affairs. I have not exercised, or attempted to exercise, any direct supervision of its business, insofar as it is related to the collection, preparation for publication, sale and distribution of news.

The defendant, continuously since its organization, has employed a general manager. The general manager so employed has had direct supervision and control of the operations of the defendant and the conduct of its business, and has had exclusive, direct supervision and control of its business of collecting, preparing for publication, selling and distributing news, inclusive of the power and duty of establishing bureaus and branches and of hiring and discharging such employees as, in his judgment, the best interests of the defendant's business required.

Mr. R. A. Farrelly was defendant's general manager from the time of its organization until the 14th day of September, 1916, and Mr. Fred J. Wilson is now its general manager and has been since that date.

I have read the bill of complaint herein and the affidavits of Melville E. Stone, Fred W. Agner, George H. Eke, E. P. Koukol and James Finnerty, attached to the order to show cause herein, all of which papers were served on me on January 6th, 1917, as the president of the defendant. Prior to the time of the service of such papers upon me, I never had heard of, nor did I know F. H. Ward, Fred W. Agnew, B. F. Cushing, or T. J. Thomas, the latter two being the persons described at folios 5 and 6 of the Agnew affidavit

as telegraph operators in the employ of the Cleveland News. I do not know the said Eke, the said Koukol or the said Finnerty.

Prior to the service upon me of the complaint and the affidavits aforesaid, I did not know and had never been informed that any person or persons in the employment or connected with the 176 International News Service had had or made any arrangement whatsoever by which the International News Service obtained information concerning the contents of Associated Press despatches by or through employes of the Cleveland News, or the New York American, or any other paper, into the office of which said despatches were delivered prior to the publication and sale of the newspaper or newspapers in which such despatches were printed.

Neither the defendant nor any of its officers and employes has, to my knowledge or with my consent, arranged with any telegraph operator, or any other employe of a newspaper owned or represented by members of complainant, by which they, or any of them, have communicated to the defendant news received by them from complainant, either as soon as the same was received or before its publication by any member of the complainant, or at any other time.

The defendant, its officers and employes, have not, to my knowledge or with my consent, ever made or attempted to make, improper and unconscionable use of the memberships held in the complainant by representatives of the New York American, the San Francisco Examiner, or the Los Angeles Examiner, or any of them, and has not induced or attempted to induce any member of the complainant to violate the By-laws of complainant or any agreement created thereby, by which their membership in complainant is controlled, or to disregard the secret and confidential character of the news transmitted to them by complainant, or to induce any members of complainant to violate any of the rules of complainant with respect to the transmission and handling of such news by its members.

On behalf of the defendant corporation, I have caused to be instituted an investigation of the statements and charges, (contained in the affidavits of Melville E. Stone, verified the 3d 177 day of January, 1917, Fred W. Agnew, verified the 28th day of December, 1916, George H. Eke, verified the 3d day of January, 1917, of E. P. Koukol, verified the 3d day of January, 1917, James Finnerty, verified the 3d day of January, 1917, and B. E. Cushing, verified the 8th day of January, 1917), to the effect that defendant had heretofore arranged with telegraph editors and employes of newspapers owned or operated by members of complainant, whereby, for consideration regularly paid, they had communicated to it news received by them from complainant as soon as the same was received, and before its publication, by a member of complainant, and to the effect that the defendant has wrongfully induced members of complainant to violate the By-laws of complainant and to disregard the secret and confidential character of the news transmitted to them by complainant.

If it is found, as a result of the investigation which this corpora-

tion has instituted, that the matters and things charged and described above were, in fact, done or procured to be done by any of the employes of the International News Service, an end will promptly be put to such practices, and such measures taken to guard against a repetition thereof as may be necessary for that purpose.

If the matters and things charged and described above, or any of them, were, in fact, done or procured to be done by any of the employes of International News Service, each and all of such things were done without my knowledge, acquiescence or consent, and in violation of a general policy established by defendant in the conduct of its business and the government of its employes.

Mr. Bradford Merrill, the vice-president of Star Company, is a member of The Associated Press, as representing said newspaper,

New York American, by virtue of which membership the
178 American is entitled to and receives The Associated Press News service.

Mr. Merrill is in direct charge of the management of said newspaper, and the employes of that paper who are engaged in the business of gathering, preparing for publication and publishing the news, are under his control and direction. A large part of its news is received in the offices of that paper over telegraph lines, including the news received by that paper from The Associated Press. The employes whose duty it is to receive all matter transmitted by telegraph to said paper are under Mr. Merrill's control and direction.

I have conferred with Mr. Merrill at different times during the time of his employment by the New York American, and prior and subsequent to the year 1915, concerning the steps that had been taken to safeguard the secrecy and to keep inviolate, under the rules of the complainant, the information and news furnished by the complainant to the New York American, and concerning the steps that Mr. Merrill had taken, (as vice-president of the Star Company and as a member of the complainant representing the New York American), to that end. Mr. Merrill, in the course of such conferences, repeatedly stated that he had given orders and adopted and promulgated rules for the government of the employes of the New York American, to the effect that no employe of the New York American should disclose any news or information received by the New York American from the complainant, to any person not entitled to the same under the rules of complainant, or permit any person to have access to the news and information furnished to the New York American by the complainant, who was not an employe of the New York American, entitled to have access thereto.

I had no knowledge or information, prior to the service of the papers served upon the defendant in this action, inclusive
179 of the affidavits attached to the order to show cause herein, that any of the information or news furnished by the complainant to the New York American had been disclosed to any person whatsoever, not entitled to the same under the rules of complainant, or that any such claim was made, or that any person

whatsoever, not entitled to have access to such news, had been permitted to have access thereto, as set forth in the affidavits annexed to the order to show cause herein.

I had likewise instructed Mr. Wilson, the manager of the International News Service, and Mr. Farrelly, his predecessor for years past, to direct all employes of the defendant, International News Service, not to use or obtain, or attempt to use or obtain, any of the despatches or news sent out by the Associated Press prior to its publication in the newspaper, and under no circumstances to permit any of the employes of that company to go to the New York American offices and there obtain, or attempt to obtain, such despatches or news.

I was informed by Mr. Merrill, Mr. Farrelly and Mr. Wilson that my instructions in this regard had been carried out by them and transmitted to their employes, and that they were being observed.

S. S. CARVALHO.

Sworn and subscribed to before me, this 15th day of January, 1917,

JOHN T. STURDEVANT,
Notary Public, New York County.

180 *Affidavit of Bradford Merrill.*

United States District Court, Southern District of New York.

THE ASSOCIATED PRESS, Complainant,
against

INTERNATIONAL NEWS SERVICE, Defendant.

STATE OF NEW YORK.

County of New York, ss:

Bradford Merrill, being duly sworn, deposes and says:

I reside at Great Neck, L. I. I am the publisher of the New York American, and am Vice President of the Star Company. I have been an officer of the Star Company for a period of more than five years last past.

I have read the complaint and the complainant's affidavits herein, attached to the order to show cause of Mr. Justice Hand.

I am a member of The Associated Press, as representing the newspaper New York American, published by the Star Company, and the New York American, by virtue of such membership, receives the news service of The Associated Press.

For some years I have had general supervision over said newspaper, in so far as the gathering and publication of news is concerned.

I have instructed the editors of said newspaper and subordinates having charge of or being connected with the publication of

181 the paper and with the telegraph room into which The Associated Press news comes, that under no circumstances must they disclose or permit to be disclosed to any one, any matter received by said newspaper by or through The Associated Press to any person whatsoever, prior to the time that such news is printed and sold in the New York American, when, of course, it becomes public property.

If any editor or any employee of the New York American permitted Frank B. Attwood or Thomas P. Coates, or any other agent or employee of the defendant, or any other person whatever not in the actual employment of the New York American, engage in the performance of his duties as such, to have access to or read or copy or make extracts or notes from any information or news matter received from The Associated Press, prior to its publication in the New York American, as described in said affidavits, or otherwise, they permitted the same to be done in violation of my express orders.

If any editor or employee of the New York American disclosed to any person whatever, not in the employment of the New York American, properly engaged in the performance of his duties as such, any information or news matter received from The Associated Press, the said disclosure was made in violation of my express orders.

I have visited the editorial rooms of the New York American, being the rooms in which the Associated Press news matter is received, and distributed for editing practically every day for several years past, and often for hours at a time each day; and from November 20, 1916, until January 2, 1917, I was personally in charge of the New York American at night and the handling and direction of its news service. In the performance of this duty, I have been constantly, during at least five hours of every night, except Sunday, at

work in the editorial rooms of the New York American, in
182 actual supervision of the editors, city, telegraph and cable, and during the busiest hours of each night have sat opposite these editors, at the same table at which the telegraph copy is edited. I have never seen, upon any occasion, or while I was at work in the editorial rooms of the New York American, any editor or employee of the International News Service, or any person not a member of the staff of the New York American, read, examine, make extracts or notes from any sheet or paper containing information or news matter supplied by the Associated Press. If I had observed, or had any reason to believe, that any employee of the New York American was disclosing the Associated Press news to any outsider, or to any editor or employee of the International News Service, I should have taken summary action to stop such disclosure and to prevent its repetition.

I once, more than a year ago, observed a subordinate employee of the International News Service in the composing room of the New York American and heard him ask a proof boy in charge of the proof press, to give him the proof of the score of a Yale-Harvard baseball game. I immediately notified the foreman of the composing room that he should under no circumstances permit any agent

or employee of the International News Service to obtain any proofs of telegraphic news printed in the New York American. I afterward related to Mr. Farrelly, then general manager of International News Service, the incident which I had observed, and stated to Mr. Farrelly that neither the International News Service, nor any of its employees, should ever use any of the telegraphic news proof of the New York American under any circumstances, even if such news, or the proofs thereof, should fall into their hands by accident, for the reason that such proof of telegraphic matter might contain news matter supplied to us by the Associated Press.

I am acquainted with Mr. John L. Eddy, who was for a short period of time Night News Editor of the International News Service. I saw Mr. Eddy, on several occasions at night, in the editorial rooms of the New York American, engaged in conversation with certain of its editors. Mr. Eddy, when I saw him, was not reading or examining any news matter whatsoever, but was apparently engaged in casual conversation with editors of the New York American, who were his friends. A short time thereafter, I went to Mr. Eddy and had a conversation with him concerning the incident which I have described above, which conversation was, in substance, as follows:

"Mr. Eddy, I want to make two statements to you, one of which is entirely personal and the other entirely official. I want you to take the latter very seriously for reasons which I am sure you will understand. First, the personal statement is that I am very glad to see you at any hour of the day or night personally, and delighted to talk with you and I like you very much. You can come to my business office at any hour of the day or night and you will always be welcome. But, second, officially, I must remind you that the New York American is a subscriber to two news services, The Associated Press and the International News Service. You represent the International News Service. We cannot permit anyone from the International News Service to be in our editorial or news department at night where he might, even by chance, see Associated Press copy which is delivered there. I have seen you once or twice of late going to the editorial rooms of the New York American, late in the evening, and chatting with our editors, all of whom, of course, are your friends. During working hours of the night, or until the paper has gone to press, I would rather that you would not even enter the news department of the American for any reason."

I am well acquainted with Mr. S. S. Carvalho, who is President of Star Company. I have frequently discussed with Mr. Carvalho the necessity of preserving the inviolability of the news matter furnished the New York American by The Associated Press, and by International News Service, and we both agreed, as the result of these discussions, that the management of the American should take every possible precaution to prevent any person, not entitled to the same, from having access to any news matter furnished to the New York American by The Associated Press, or International News Service.

No officer of The Associated Press, all of whom I know well, has

ever complained or intimated to me that employees of the New York American were permitting persons, not entitled to the same, to have access to the news matter furnished to the New York American by The Associated Press, nor has The Associated Press, or any of its officers or employees, even suggested to me that employees of the New York American were carelessly handling news matter received from The Associated Press.

I had full authority and power to take summary action to prevent any abuse or any improper use of the news matter furnished by The Associated Press, and I should have exercised that power drastically at any time and under any circumstances, if I had been informed, or had any reason to believe, that employees of the New York American were improperly or wrongfully permitting outsiders, persons not entitled to the same, to have access to any news matter furnished to the New York American by The Associated Press.

I shall, as publisher of the New York American and as a member of the complainant, representing the New York American, 185 thoroughly investigate the charges set forth in the affidavits attached to the order to show cause issued herein, which relate to the disclosure by the New York American of information and news matter received by it from the complainant, and I shall immediately take adequate measures, whether I find the matters and things set forth in said affidavits to be true or false, to prevent a possibility of the disclosure, by any employee of the New York American, of any information or news matter furnished to it by the complainant. I will not only promulgate rules for the government of the employees of the New York American to that effect, but I will give the execution and enforcement of those rules my personal attention.

BRADFORD MERRILL.

Sworn to before me this 11th day of January, 1917.

[SEAL.]

WILLIAM A. HAYES,

Notary Public, Bronx County, #19.

Certificate filed in N. Y. County, #146.

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Affidavit of Bradford Merrill.

United States District Court, Southern District of New York.

THE ASSOCIATED PRESS, Complainant,
against

INTERNATIONAL NEWS SERVICE, Defendant.

STATE OF NEW YORK,

County of New York, ss:

Bradford Merrill, being duly sworn, deposes and says:

I have read the affidavit of E. P. Koukol, attached to the order to show cause herein of Mr. Justice Hand and verified January 3, 1917.

At folio 5 of said affidavit said Koukol refers to a despatch received on the Morkum machines on the night of November 21, 1916, referring to the news of the death of the Austrian Emperor, and said Koukol states that he heard Mr. Dunn call to an office boy to run down stairs and inform them that the Austrian Emperor was dead.

Deponent Koukol then says "that the said message was no doubt sent to the International News Service as the International News Service occupied the floor below."

The affiant Koukol is entirely in error as to what Mr. Dunn said and his supposition is entirely erroneous. What actually happened was this:

On the night the Associated Press reported the news of the death of the Austrian Emperor, I was in the office of the New York

187 American and was sitting at the time within five feet of Mr. Dunn's desk when the news came in. I personally took the Associated Press copy from the Morkum operator and personally edited and handled the news myself as it came in only ten minutes before the American went to press. There was no time to turn it over to anyone else.

As soon as the news came in, someone said to notify the "obit," that is to say the reference department of the New York American, that the Austrian Emperor was dead, in order to get the clippings and material pertaining to his life, and Mr. Dunn told an office boy to tell the War Editor, who had gone to the composing room, that the Austrian Emperor was dead.

Mr. Dunn and I went immediately to the reference department ourselves, however, and I procured the envelopes containing the history of the deceased Emperor. I then went to the composing room and held the first page of the paper in the first edition, in order to get the obituary in.

Mr. Dunn did not tell the office boy, or anyone else, to run down stairs and inform the International News Service that the Austrian Emperor was dead, and gave no instructions whatever of this character.

Mr. Edrop, the Night City Editor of the New York American, was also sitting within five feet of Mr. Dunn and near me at the time these transactions took place.

BRADFORD MERRILL.

Sworn to before me this 16th day of January, 1917.

CHARLES J. W. MEISEL,
Notary Public, N. Y. Co.

Affidavit of Lewis Taplinger.

United States District Court, Southern District of New York.

In Equity.

THE ASSOCIATED PRESS, Complainant,

against

INTERNATIONAL NEWS SERVICE, Defendant.

STATE AND COUNTY OF NEW YORK, ss.:

Lewis Taplinger, being duly sworn, deposes and says:

I reside at No. 1232 Ocean Avenue, Borough of Brooklyn, City of New York.

I am at present an employee of Star Company, publisher of the New York American, as Night Editor of that paper, and have been so continuously since 1913. Retaining my position as Night Editor, I acted as War Editor of the New York American during the period commencing about November, 1914, and terminating about a year thereafter.

It was my duty, as Night Editor, to examine, reject or pass for publication, "copy" of news matter for publication in the New York American, inclusive of "copy" prepared from the information furnished the American by the Associated Press.

My duties as War Editor of the New York American were to receive despatches relative to the European War, which came into the office from any source, inclusive of all information and despatches received from the Associated Press; to edit the information and despatches so received and to cause the same, if I deemed it necessary, to be rewritten for publication by members of the Editorial Staff of the New York American.

The information received from The Associated Press is obtained from mimeographed reports, delivered by The Associated Press, by its messengers, to the American, at the latter's editorial rooms, between the hours of 3 p. m. and 6 p. m. of each day. Additional information is received from The Associated Press over a leased wire from the Morkrum machines, machines which receive and print the news sent to the American by The Associated Press over the leased wire. These machines automatically print the matter sent by The Associated Press to the American, over the leased wire.

A large part of The Associated Press day report, received from the mimeographed copy described above, is matter that has been used by the afternoon papers, that is to say, consists of matter that has been published and circulated on the streets in the afternoon papers. Nearly all of this matter is of that character, that is to say, is matter which has been published and circulated on the streets prior to 6 p. m., by the afternoon papers.

The Morkrum machines, referred to above, are located in a small,

partitioned room, on the west side of the Editorial Rooms of the New York American. My desk, when I was acting as Night Editor, was at the right of the door entering the partitioned room in which these machines were kept. My desk, when I was acting as War Editor, as stated above, was a few feet away from the desk which I occupied as Night Editor, and but a few feet away from the door of the partitioned room in which the Morkrum machines were kept. The desk that I occupied was in full view of the desks occupied by the editors of the New York American. The desk of the Telegraph Editor, the Editor who handles all telegraphic news, was immediately adjoining the desk of the War Editor, and the desk of

190 the War Editor was immediately adjoining the desk which I occupied when I served as Night Editor. I was in a position to observe all persons who entered the editorial rooms of the New York American and especially those who approached the desks where the Associated Press matter was deposited and handled and the door to the room in which the Morkrum machines were kept.

I never, during all of the period of my service, as stated above, observed an editor or employee of the International News Service enter the room in which the Morkrum machines were kept.

I did not, during all of the period of my employment, described above, observe any editor or employee of the International News Service approach the desk of any editor of the New York American entrusted with handling the reports and matter supplied by the Associated Press and scan such reports and matter, or make extracts or copies therefrom or notes thereon.

I was instructed, at the commencement of my employment with the New York American as Night Editor, by one of the executive officers of Star Company, or by one of the Managing Editors of the New York American, to prevent any person, other than an employee of the New York American, from scanning, or from having access to—for any purpose whatsoever—any reports, bulletins or despatches received from The Associated Press. I did not permit any employee of the International News Service, during the period of my employment, as stated, to have access to, or to scan, or to copy, or to make extracts from any bulletin, report or information received from The Associated Press.

I have read over the affidavit of E. P. Koukol, verified the 3rd day of January, 1917, being the affidavit annexed to the order to show cause issued herein.

I never, during the period of my employment with the
191 New York American, as stated above, saw Mr. Atwood enter the editorial room of the New York American and go to the War Editor's desk and look over the Associated Press Day Report, which had been delivered by messenger. I can conceive of no reason why Mr. Attwood should do this under any circumstances, because of the fact that the matter contained in the Day Report is published and circulated on the streets by the afternoon Associated Press papers.

I never saw Mr. Attwood, during the entire period of my service with the New York American, as stated above, come to the editorial room of the New York American at night and look over the "copy"

received from The Associated Press over the Morkrum receiving machine; nor did I ever see Mr. Attwood, at any time, make notes of any despatches received from The Associated Press, under a date line.

I saw Mr. Attwood in the editorial rooms of the New York American, at night, many times prior to October 10, 1916, and during the period of my service, as stated above. I did not see Mr. Attwood at any of these times read or copy, or make extracts, or make notes from any of the Associated Press matter received in the editorial rooms of the New York American. Mr. Attwood, at these times, conferred with me concerning the rewriting of special cables received by the New York American from abroad, and by the International News Service, when these cables related to the same subject matter. I gave Mr. Attwood, at these conferences, instructions as to how these various special cables, bearing upon the same subject matter should be written to make consecutive and complete stories.

Mr. Attwood, at these conferences, also took notes from instructions

I gave him as to how the Washington Bureau of the New York American and the International News Service should
192 York American and the International News Service should handle the Washington news, which they had collected.

It has been a rigid rule, applicable to the Editorial Staff of the New York American during the period of my service, as stated above, that no person whatsoever, who was not a member of the staff of the New York American, should have any access whatsoever to any of the information, reports or news, supplied by The Associated Press to the New York American. It was likewise a rigid rule that no member of the staff of the New York American, nor any of its employees, should disclose to any person outside of the New York American, and then only in the course of the preparation of the paper for publication, any of the information or news whatsoever received from The Associated Press.

The Associated Press assigned, during the period of my service with the New York American, as stated above, certain of their employees to inspect the operation of the Morkrum machines, for the purpose of making such reports as might be necessary because of defective operation. These Associated Press inspectors were on duty inspecting these Morkrum machines from six o'clock in the evening until the last report had been received from The Associated Press over the Morkrum machines, that is to say, until the news service of The Associated Press, over the Morkrum machines had ended for the night.

No report was ever made to me, by any of the Associated Press inspectors of these Morkrum machines, that the despatches received from The Associated Press over the machines were being scanned or read, by any employee of the International News Service, or by any person who was not in the employment of the Editorial Staff of the New York American. I never heard of these inspectors making any such report to any person in the employment of the
193 New York American, or connected with its business or editorial staff.

I never heard, during all the course of my service, as stated above, any objection made by The Associated Press or by the inspectors of its Morkrum machines, to the way in which the employees of the Editorial Staff of the New York American were handling the Associated Press news.

LEWIS TAPLINGER.

Sworn to before me this 12 day of January, 1917.

J. A. BRASHEARS,
Notary Public, New York Co.

194 *Affidavit of Percy T. Edrop.*

United States District Court, Southern District of New York.

THE ASSOCIATED PRESS, Complainant,
against

INTERNATIONAL NEWS SERVICE, Defendant.

STATE OF NEW YORK,

County of New York, ss:

Percy T. Edrop, being duly sworn, deposes and says:

I am the night city editor of the New York American. I have read the annexed affidavit of Bradford Merrill, verified the 15th day of January, 1917. I have also read the affidavit of E. P. Koukol, verified January 3d, 1917. The night the news of the death of the Austrian Emperor came in, I was sitting within five feet of Mr. Dunn's desk, Mr. Dunn being the person referred to in the Koukol affidavit. Mr. Merrill, who was in the office at the time, took the message from the Morkrum operator and personally edited it, as it came in only about only ten minutes before the American went to press. I heard Mr. Dunn say to an office boy to tell the War Editor, who had gone to the composing room, that the Austrian Emperor was dead. Mr. Dunn then left the other side of the city desk to go to the obituary department and obtain clippings and other matter relating to the life of the Austrian Emperor.

195 He did not say to the office boy to run down stairs, meaning to the International News Service, and inform them that the Austrian Emperor was dead, and issued no instructions about notifying the International News Service of this fact.

PERCY T. EDROP.

Sworn to before me this 15th day of January, 1917.

JOHN T. STURDEVANT,
Notary Public, New York Co.

Affidavit of Martin T. Dunn.

United States District Court, Southern District of New York.

THE ASSOCIATED PRESS, Plaintiff,

against

INTERNATIONAL NEWS SERVICE, Defendant.

STATE OF NEW YORK,

County of New York, ss:

Martin T. Dunn, being duly sworn, deposes and says:

I am the assistant night city editor of the New York American. I have read the affidavit of E. P. Koukol, verified January 3, 1917, and the affidavit of Bradford Merrill, verified January 15, 1917.

I distinctly remember the occasion referred to in the affidavit of Koukol when the news of the death of the Austrian Emperor was received in the New York American office from the Associated Press. At the time the news came in the Morkum operator handed the bulletin to me. I called an office boy and told him to notify the War Editor of The American, who had gone upstairs to the composing room, that the Austrian Emperor was dead. This was done so that we could get the news in the first edition of the paper, which was about to be got to press.

Mr. Bradford Merrill overheard me, and took personal charge of the story. With Mr. Merrill I went to our reference department to find a written obituary notice of the dead Emperor so that we would have an adequate story for our first edition.

I did not tell the boy to tell the people downstairs, namely, the International News Service, that the Emperor of Austria was dead, and I did not tell anybody at any time to notify the International News Service that The American knew or had been informed that the Austrian Emperor was dead.

MARTIN T. DUNN.

Sworn to before me this 15th day of January, 1917.

JOHN T. STURDEVANT,
Notary Public, New York Co.

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Affidavit of Fred J. Wilson.

United States District Court, Southern District of New York.

THE ASSOCIATED PRESS, Complainant,

against

INTERNATIONAL NEWS SERVICE, Defendant.

STATE OF NEW YORK,

County of New York, ss:

Fred J. Wilson, being duly sworn, deposes and says:

I am the general manager of the International News Service the defendant above-named, and have been such continuously since September 15th, 1916.

Mr. Barry Farris, from the time I became general manager of the defendant until January 9th, 1917, was the Day News Manager of the defendant, and supervised and directed the collection, preparation and distribution of the entire day news report of the International News Service.

The International News Service is a New Jersey corporation, engaged in the business of collecting, preparing for publication, distributing and selling news, artistic and literary material for publication in newspapers throughout the country. The defendant gathers and distributes news from all parts of the world, and has its correspondents and original sources of information throughout the United States and abroad. It has at the present time, and has

had at all of the times mentioned in the complaint herein, 198 correspondents in England, France, Germany, Italy and other continental countries, as well as in Mexico, Cuba, South America and Japan. It has gathered, obtained and procured, by its agents and instrumentalities, all kinds of information and intelligence, including current news, telegraphic or otherwise, and has supplied and is now supplying the same, by mail, telegraph and telephone, for an agreed price, to newspapers throughout the United States, Canada and in foreign countries. At the present time, about four hundred newspapers located in the various cities of the United States and abroad are taking and for some time past have been taking all or part of the news and feature service of the defendant corporation.

As to many newspapers which are taking the news service of the defendant, the defendant has obligated itself by contract to furnish its news, or some part thereof, and to deliver the same by leased day or night wire. Certain of these corporations are also members of The Associated Press.

It is of the utmost importance that the defendant shall furnish and deliver to its customers the information and matters of news which it has collected as speedily as possible, and all of the defendant's customers are served with the news service which they

have purchased either by telegraph or telephone, so that news collected by the defendant is promptly transmitted to its subscribers for publication in their newspapers. The speedy delivery of this matter is, of course, essential to its news value.

The cost of collecting and distributing local and foreign news, which the defendant furnishes to its subscribers, is very great, and I believe amounted, during the year 1916, to more than two million dollars. The value of the news service thus furnished by the defendant to its subscribers largely depends upon the promptness of its service and the accuracy and impartiality of its news, inasmuch as the newspapers served by the defendant are of all varieties and shades of political opinion and news policy.

It is also essential that the news of the day shall be transmitted by the defendant to its subscribers as early or earlier than similar information can be furnished to other competing newspapers by other news services, and that such news or information collected by the defendant shall not be furnished to other newspapers which do not subscribe to the defendant's service and which do not pay therefor, and thus indirectly contribute to the expense of gathering such news. It is also important that the news collected by the defendant shall remain confidential and secret until its publication has been fully accomplished by all of the defendant's members, because otherwise competing newspapers which do not subscribe to the defendant's service, would unfairly and inequitably receive the benefit of its service, and such a result would greatly impair the usefulness of the defendant to its subscribers.

In addition to the sources of information which the defendant has and maintains, the defendant, through its employes, reads each day a great number of newspapers for items of news therein contained which have not been received by the defendant through other sources, and, as does every other newspaper and news agency in this country and abroad, rewrites for publication any news therein contained which it deems of sufficient importance to interest its subscribers, and as rewritten, furnishes such subscribers therewith.

The defendant, its officers, agents and employes, have not, with my knowledge and with my consent, been engaged, during the period I have been its general manager, in the practice of obtaining, unlawfully or improperly, news which The Associated Press has gathered for the use of its members, nor have the defendant's employes been engaged, to my knowledge and with my consent, in improperly appropriating such news or in selling and transmitting the same to the defendant's clients as if the same had been gathered by the defendant's independent efforts and from original sources of information. It is a fact, as I have pointed out, that occasional items of news appearing in a newspaper taking The Associated Press service have been rewritten by the defendant and sent out to the defendant's subscribers, when the importance of the news has justified it.

The defendant, its officers, agents and employes have not, to my

knowledge and certainly not with my consent, during the period of my management of the business of the defendant, as stated above, arranged with any telegraph editor or other employe of any newspaper represented by members of the complainant, to have communicated to defendant news received by such papers from complainant, as soon as the same was received and before its publication by complainant's members.

The defendant, its officers, agents and employes have not, to my knowledge and certainly not with my consent, made any improper and unconscionable use of the memberships held in the complainant by representatives of the New York American, the San Francisco Examiner and the Los Angeles Examiner, nor have they unlawfully and wrongfully induced those members of complainant to violate the by-laws of the complainant or any agreement thereby created, and to disregard the secret and confidential character of the news transmitted to them by the complainant in any respect, or under any circumstances.

My offices, as general manager of the defendant, are located at No. 238 William Street, Borough of Manhattan, City of New York, from where I direct or conduct all defendant's business, as stated above. My offices are located in the same building with 201 certain of the offices of the New York American, but not on the floor on which the editorial rooms of the New York American are located.

I have and had no knowledge or information, except the information set forth in the bill of complaint herein and in the affidavits annexed to the order to show cause issued and served herein, that the defendant, its officers or agents made any improper or unconscionable use of the memberships held in the complainant by representatives of the San Francisco Examiner and the Los Angeles Examiner, as set forth above, or that the defendant, or any of its officers or employes, had induced said members of the complainant to violate its by-laws or disregard the secret and confidential character of the news transmitted to them by complainant, as set forth above.

I have no knowledge or information, except the information contained in the bill of complaint herein and in the affidavits annexed to the order to show cause, issued and served herein, that the defendant, its officers or agents, made any improper or unconscionable use of the membership held in the complainant by the representative of the New York American, as set forth above, or that the officers, agents or employes of the defendant, or any of them, had induced the said New York American, or any of its agents or employes to violate the by-laws of the complainant or disregard the secret and confidential character of the news transmitted to them, or to the New York American, by the complainant, as set forth above. But, on the contrary, I have positively and repeatedly instructed the employes of the defendant in New York, that they were, under no circumstances whatever, to make any attempt to gain access to or knowledge of The Associated Press de-

spatches delivered to the New York American by the complainant, or to even look at the same.

202 I said to such employes further, in explanation of the instructions given, as set forth above, that they must not, under any circumstances, do anything that might imperil the relations existing between the New York American and The Associated Press.

I recall an incident that furnished me a specific reason for giving, on one occasion, the instructions set forth above, which incident was as follows:

I was informed, in or about the month of November, 1916, that some agent of the complainant had approached a telegraph operator employed in the office of the International News Service and had inquired of that operator whether he had any knowledge or information as to whether the International News Service had taken, or was taking, news of the complainant which had been furnished to the New York American. I was further informed that the operator who was approached, as stated above, had said to the agent or representative of the complainant, that he had no such knowledge or information. I thereupon renewed to the employes of the International News Service the instructions set forth above, and I renewed these instructions, as stated, in even a more positive and drastic form than they had been originally given.

I am acquainted with Fred W. Agnew, whose affidavit is annexed to the order to show cause issued and served herein. The said Agnew was Bureau Manager, that is, local manager, of the International News Service, at Cleveland, Ohio, at the same time that I entered upon the performance of my duties as General Manager of the International News Service.

I am not acquainted with and have never seen the T. J. Thomas whose affidavit is annexed to the order to show cause issued and served herein.

I am not acquainted with nor have I ever seen the B. E. Cushing whose affidavit has been served upon the defendant, as I am informed, in this case.

203 I caused or consented that said Agnew be notified, on or about the 17th day of November, 1916, that he was to no longer act as Bureau Manager of the defendant at Cleveland, Ohio, and I also caused or consented that he should be notified that he would be retained, if he so desired, as a telegraph operator in connection with the Cleveland, Ohio, bureau of the International News Service, the said Agnew having formerly been a telegraph operator before he became the Bureau Manager of the Cleveland office of defendant. I had subsequently been informed that said Agnew had been so notified, and that one Frank Ward had been appointed and was serving as Bureau Manager at Cleveland in Agnew's place and stead, and that Agnew was serving as a telegraph operator in connection with the Cleveland Bureau of the defendant.

The Frank B. Ward referred to, was appointed Bureau Manager of the Cleveland office of defendant with my knowledge and con-

sent, and, as I am informed and believe, has acted continuously in that capacity since on or about the 17th day of November, 1916.

The duties of a Bureau Manager of the defendant, which includes, of course, the duties of the Bureau Manager at Cleveland, Ohio, are as follows:

To supervise and conduct the business of the defendant at the point where the bureau is located and to supervise and direct the work of the persons employed in connection with the bureau. The Bureau Manager is responsible for and has exclusive control of the collection and distribution of the news of the defendant in the Bureau territory.

The duties of the Bureau Manager in performing this work are that he should collect news originating in his particular
204 territory and transmit the same to the central office.

The duties of the manager of the Cleveland Bureau of defendant are to collect all local news in Cleveland and the district tributary to the Cleveland Bureau, and in case of important news which is of country-wide value and interest, to advise the New York office of the character of the story obtained and of the number of words necessary to tell the story. Then, on the order of the New York office, and when it permits it to come on the wire, to telegraph all clients in that section of the service, the said story, either at its full length or a length dictated by the New York office. The Bureau Manager is held responsible for the collection of all news matters originating in his district. If the news is of particular interest to clients in the Ohio Circuit of the defendant, the Cleveland Bureau Manager, without direction from New York, and using his own judgment, files such news or causes such news to be carried over the Ohio telegraph circuit to the clients and customers of defendant in that circuit.

The Cleveland Bureau Manager, in addition to the performance of these duties, is entrusted with the duty of supplying, by telephone or telegraph, to clients in immediate touch with his bureau, abbreviated news reports of the world and of the Cleveland district, he handling this matter to these clients, who are known as pony clients, entirely in the exercise of his own discretion.

The Cleveland Bureau Manager, in his collection of the news local to Cleveland, is empowered to pay a stated salary to a man selected by him, who is employed in the office of the Cleveland News, and to make an arrangement with such person to assist him in getting whatever local news the Cleveland News might get which would be of interest to the clients of the defendant.

Some time in October, a serious bridge disaster occurred
205 in Cleveland, at about five p. m. The Cleveland Bureau Manager, Mr. Fred W. Agnew, failed to adequately cover this story. In the same month of October, 1916, I was in Cleveland on a business trip and visited the Cleveland Bureau, where I met Mr. Agnew for the first time, which is the only time I have ever seen him. I severely criticised Mr. Agnew for failing to adequately cover this bridge story. Mr. Agnew said, in answer to my criticism, that he had been unable to adequately cover the bridge story because

the man on the Cleveland News who protected him on local news matters went off duty about four o'clock, and there was no one to inform him quickly about the disaster. Mr. Agnew said that because of the fact that he had not been tipped off to this item of news by the man on the Cleveland News, employed by him to tip him off, that he had been unable to cover the story and could not carry such stories under such circumstances without additional assistance. I, therefore, authorized Mr. Agnew to employ some other person on the Cleveland News to protect us as to local happenings, when our other employe on the Cleveland News was off duty. I am informed and believe that pursuant to the authority so given him, Mr. Agnew employed Mr. P. J. Thomas, whose affidavit is annexed to the order to show cause herein, to do this work.

It is my recollection that I authorized Mr. Agnew, in the course of this conversation, to pay each of the men employed by the Cleveland News, who were employed by defendant's Cleveland Bureau to tip it off as to Cleveland local happenings, at a flat rate of five dollars per week. I had no knowledge or information that Mr. Agnew was obtaining from either Mr. Cushing or Mr. Thomas, or from any other person, in the service of the Cleveland News, any information as to Associated Press despatches furnished the Cleveland News by The Associated Press.

It was my understanding that the men employed by the Cleveland News and paid by us, were so paid for the purpose of protecting us in the local news of Cleveland and vicinity, and it was with this idea in mind that I considered five dollars a week sufficient compensation for that.

The defendant delivers its news service to newspapers throughout the country, which also receive the news service of the complainant. The newspapers so served by both the defendant and the complainant are accustomed, in many cases, when preparing an article for publication, concerning the event described in the stories of the defendant and the complainant, to combine the matter contained in both such stories. It has been the custom of newspapers, in cases where they have received information concerning an event from The Associated Press, to call up the local bureau of defendant and inquire, describing in a general way the story which they received from The Associated Press, what information the defendant has with respect to the same story. It has also been the custom of such newspapers, when they have received a story concerning an event from the defendant, to call up The Associated Press, and generally describing the information which they have received from the defendant, ask The Associated Press Bureau what they have on the same story. This is done for the purpose stated, namely, to enable the editor of the newspaper receiving both services to arrange a single article covering the information received from both the defendant and the complainant, or from any other source, with a view to publishing in said newspaper every possible fact having any bearing upon the matter in question.

Of course, when a newspaper taking the news report of both complainant and defendant, calls the local bureau of either news

207 service and asks what information that bureau has as to a certain story which the paper has received from the other service, the local bureau so called is advised at once of the existence of such story and of the fact that the opposition news service is carrying it.

I have read the affidavits of Melville E. Stone and Fred W. Agnew, attached to the order to show cause of Mr. Justice Hand herein.

The news matters and despatches which are quoted and referred to in said affidavits as having been sent out by the International News Service, are but an infinitesimal part of the news collected and distributed by the International News Service during the months of November and December, 1916. For example, during this period of time, the International News Service report consisted in the neighborhood of forty thousand words of news matter sent out by the International News Service during each twenty-four hours. The apparent assumption of The Associated Press that because the International News Service had been denied the use of cables from London during the period referred to most prominently in the suit, that the International News Service was not receiving from foreign countries any news report, is erroneous. The International News Service, during this period was, in fact, receiving from London and elsewhere in Europe large quantities of news, and for that news was paying large sums of money for cable tolls and maintaining special correspondents at a large cost in London and elsewhere. The International News Service is still receiving news from abroad.

The International News Service did, in fact, receive cable news, exclusive of any news received by The Associated Press or other competing press associations, on a number of the matters referred to in

The Associated Press complaint, and did pay considerable
208 sums of money to obtain this news. Thus, the contention of

The Associated Press that news relating to the same facts as were carried in Associated Press despatches was obtained by appropriating news of The Associated Press, because the International News Service had no news sources abroad, is not true.

The International News Service, like every other news gathering organization in the world, whether newspaper or news service, has utilized and does utilize items and matter of news which have been published in newspapers. The International News Service, for the benefit of its clients, utilizes, to complete its news report, the knowledge of any fact which it can gather.

It is a fact that the International News Service was barred by the British Government from the use of the cables from England to America for the transmission of news on or about October 10th, 1916. The British Government claimed that the International News Service changed and garbled reports sent from the London office of the defendant to its central office in New York, basing its claim on the assertion that certain American newspapers had printed material credited to the International News Service which was different from the reports as sent from the London office of the defendant and censored.

While some reports did appear in a number of papers published in this country and served by the defendant, there is not one single

instance, to my knowledge, where the defendant changed, or caused to be changed, in any material particular, any dispatch received from its London office.

I am informed and believe that two specific charges have been made by the British Government as the basis for cutting the
209 defendant off from the use of the cables between England and this country. These were,

First, a story in the Chicago Examiner regarding a zeppelin raid, in which that newspaper (not the defendant) combined in one article the defendant's report from London and the defendant's report from Berlin, and to this story containing the combined information, a headline was prefixed as follows, "London in Flames," whereas the text of the despatch sent out by the International News Service stated that fires had broken out in many parts of London. With the headline, however, the defendant had nothing *had nothing* to do, and was in no sense responsible for it.

Second, With regard to the Jutland Naval Battle, one of the clients of the defendant combined with the defendant's London despatch news obtained from other sources, and credited the whole to the defendant. In this instance likewise, the defendant was not responsible.

The British Government was also angered by the action of the defendant in sending out material which had been suppressed by the censors and which the defendant, through its enterprise, managed to obtain, notably the sinking of the super dreadnaught Audacious, the deposing of the Khedive of Egypt, the declaration that Great Britain would annex Egypt, and other matters which the British censors desired suppressed.

I reiterate the statement above made that so far as I know, the defendant has at no time falsified or garbled any of the news matters received from its London office, and I verily believe that the British Government, either through misinformation or otherwise, has acted unfairly and unjustly in denying to the defendant the use of the
210 cables from London. This stoppage of the use of the cables for the transmission of the news has inconvenienced the defendant, and has compelled it on certain matters to use certain news after it had already been printed in other papers, which practice, however, is customary among all news services and among all newspapers, as has been pointed out above.

FRED J. WILSON.

Sworn and subscribed to before me, this 15th day of January, 1917.

JOHN T. STURDEVANT,
Notary Public, New York County.

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Affidavit of Barry Faris.

United States District Court, Southern District of New York.

THE ASSOCIATED PRESS, Complainant,

against

INTERNATIONAL NEWS SERVICE, Defendant.

STATE OF NEW YORK,

County of New York, ss:

Barry Faris, being duly sworn, deposes and says:

I reside at No. 14 Butler Place, Borough of Brooklyn, City of New York.

I was employed as Assistant to the News Manager of the Press Association, commonly known as the United Press, for the period commencing about July 20th, 1914 and terminating in July, 1915. I was first employed by the Press Association as a reporter, and later became its Assistant News Manager. When I was Assistant News Manager of the Press Association, I was connected with its New York offices. It was my duty, as such Assistant News Manager, to directly supervise the collection and distribution of the news by that association and its employees.

I was employed by the defendant on August 2nd, 1915, as Assistant Bureau Manager of its bureau at Washington, D. C. It was my duty, as such Assistant Manager, to directly supervise the bureau's collection and distribution of news.

I was assigned by the defendant, on or about September 1, 1916, to the management of its Chicago bureau, where my duties were practically the same as at Washington.

I was assigned by the defendant to take charge of the News Department at its central offices in New York City on or about September 20th, 1916, and I was continuously so employed until on or about January 8th, 1917, when my employment terminated.

It was my duty, as head of the News Department of the defendant, to directly supervise and control its collection and distribution of news throughout the United States and elsewhere, and I had the direct supervision and control of the News Department of the defendant.

No agent or employe of the defendant has, to my knowledge, or with my consent, since I became News Manager of the defendant, ever arranged with any teiegraph operator or other employe of a newspaper owned or represented by members of complainant, to have communicated to the defendant, news received by them from complainant.

Employees of defendant have, at various times since I became manager of its News Department, communicated with me, as News Manager of the defendant, tips or suggestions concerning stories that were

being carried by the complainant and by other press associations. I have used the tips or suggestions so obtained for the purpose of obtaining the full story to which the tip or suggestion related. I do not recollect having ever sent out any information to clients of defendant without verification upon the tip or suggestion so received. It was my invariable custom and rule, upon the receipt of such tip or suggestion, to verify it from first-hand information, or from other sources under my control, and if verified, to send the story out to defendant's clients and customers as verified.

I am acquainted with Fred W. Agnew, whose affidavit is annexed to the order to show cause issued and served herein. The said Agnew was Bureau Manager, that is, Local Manager, of the International News Service at Cleveland, Ohio, at the time when I entered upon the performance of my duties as News Manager of the defendant.

213 I am not acquainted with and have never seen T. J. Thomas, whose affidavit is annexed to the affidavit to show cause issued and served herein.

I am not acquainted with, nor have I seen the B. E. Cushing whose affidavit has been served upon the defendant, as I am informed, in this case.

I knew that Mr. Agnew, and former managers of the Cleveland Bureau of defendant, had made an arrangement with an employe of the Cleveland News to furnish tips as to the local news, that is to say, to furnish us information as to local happenings in Cleveland, Ohio, or the immediate surrounding territory, which had been covered by reporters of the Cleveland News, or its correspondents. I knew that such managers were paying such persons, that is to say, the men on the Cleveland News who furnished us with such information, a small weekly compensation for so doing, namely: a salary of \$5.00 a week.

I had no knowledge or information that the men on the Cleveland News who were employed by the defendant's local Cleveland Bureau to furnish it news of local happenings, were also furnishing to defendant's local bureau tips of news matter furnished to the Cleveland News by the complainant herein.

I never had any knowledge, or information or suspicion that such tips or suggestions as emanated from the Cleveland office of the International News Service, were being furnished to defendant's bureau at Cleveland by the men on the Cleveland News who had been employed to furnish defendant's local bureau with information concerning local news at Cleveland, as described above.

I did know that the men on the Cleveland News who had been employed by defendant's Cleveland Bureau to furnish it news of local happenings, were each receiving a compensation of \$5.00 per week.

It must be perfectly clear to anybody that I would never
214 suspect that men who were getting \$5.00 per week, under what I understood to be an arrangement to furnish defendant tips of local happenings, were, in fact, furnishing us, regularly and systematically, tips of valuable news carried by the complainant.

I never gave the matter any thought at the time, because I had no

reason to suspect that these men were being employed for any purpose other than the one which I have stated.

I believed that the tips or suggestions that Agnew telegraphed to me at New York, concerning stories which were being carried by The Associated Press, were based upon information which he had obtained from some friend of his without consideration.

If I had had, at any time, the slightest suspicion that Agnew was paying any employe of a member of complainant to reveal to him (Agnew) information concerning the news stories carried by The Associated Press, I would have terminated Agnew's relations with the company at once.

I had no suspicion that Agnew had made an arrangement of the sort which he says he made, because, if I had, it would have been perfectly foolish for me to have reduced Agnew from his position of Bureau Manager and made him again a telegraph operator attached to the bureau. The reduction of Agnew, under such circumstances, would have been simply an invitation to him to reveal the alleged arrangement to which he intimates I was a party, or of which he intimates I had knowledge.

I did write the letter dated November 21st, 1916, addressed to F. H. Ward, No. 720 The Arcade, Cleveland, Ohio, which is set forth at folios 26, 27 and 28 of the affidavit of Melville E. Stone, annexed to the order to show cause issued and served herein.

I did know, at the time that that letter was written, that Agnew had sources of information as to stories which The Associated Press was carrying, but I did not know whence he had obtained his information.

At the time that I wrote the letter to Ward, referred to above, I did know that we were carrying on the pay roll of our Cleveland Bureau two men, employed by the Cleveland News, who had been employed to furnish us, for a small consideration, tips concerning local news, as stated above. I did not know that these men were furnishing us tips concerning Associated Press news matter. The fact that I did not know that these men were furnishing us tips concerning Associated Press news matter is clearly shown by the following sentence of the letter referred to:

"I wish you would find out from him (Agnew) just what this connection was, and if you cannot make use of it."

If I had known that two men on the Cleveland News had been employed to give us this news, I should not have asked Mr. Ward to find out from Mr. Agnew the source of his information.

I have stated above that during the time when I was employed by the United Press, it was my duty to assist in supervising the gathering of news in this country and the distribution of news wherever gathered to the subscribers of the service of that corporation.

The main trunk line of the United Press goes out of the New York office of that company.

While I was employed in the capacity aforesaid, many messages coming over said trunk wire from the various bureaus of said United Press throughout the United States and elsewhere, came to me, and I read them. In a great many instances, messages were delivered to

me emanating from the various bureaus of the United Press, some of them coded and some not, calling the attention of the New York office to the fact that the International News Service was carrying a story which was of general interest to the locality in which
216 the notifying bureau was located, and which meant that this local bureau had not yet received the story and was anxious to get it. Whenever it was desired to send a message referring to a story which the International News Service carried in the manner aforesaid, the message would begin with the word "Hearst," which was understood by the employees of the United Press to refer to the International News Service, and this word would be followed with a tip as to the origin and general character of the story. Upon receipt of such tip, through whatever means of information it possessed, the United Press would immediately endeavor to procure the information about the story to which it had been tipped, and when it obtained it, would at once put the story on the wire and send it out.

It is a well known and I believe practically universal custom for the news services of this country to receive tips of the character which I have outlined, and to promptly investigate them when so received, and by using these tips to obtain information, are enabled to send out the stories to their subscribers.

Referring to the affidavits of Melville E. Stone and Frank W. Agnew, in so far as they relate to matters of news and despatches sent by the Associated Press to its members, and sent by the Cleveland Bureau of the International News Service to the head office of the International News Service in New York, and messages and matters of news sent out by the International News Service in New York to Cleveland and to its subscribers, the facts are, in so far as I can recollect, that except in two instances, the news matter sent out by the International News Service to its subscribers, was sent out from information independently obtained by the defendant and from information received from sources other than The Associated Press;

that is to say, that in instances where the International News
217 Service received a tip from its Cleveland Bureau that the Associated Press was carrying a certain story which the International News Service did not then have, I directed an independent inquiry to be made at once as to that story and then sent it out from the information so obtained.

When the Cleveland Bureau of the International News Service sent out the story relating to the mine disaster in Birmingham, Alabama, which is referred to at folio 7, page 12 of Mr. Agnew's affidavit, I notified our Chicago Bureau Manager to ascertain from Birmingham whether the story was correct or not and I also sent the following message, quoted at folio 7, page 13 of Mr. Agnew's affidavit, to Mr. F. H. Ward, the Cleveland Bureau Manager, to wit:

"Ward. Under no circumstances ever put out such bulletin again. We have bureau in Birmingham. Message us only. Do not rewrite anything. B. F. New York December 21, 11:12 a. m."

My purpose in sending this message to Mr. Ward was to warn him that I did not want him to do such a thing again. I did not want him to rewrite any matter, but merely to notify us if he learned of

the existence of a story so that we could obtain the information through our own resources, which, as I have already stated, is a common practice in press associations.

BARRY FARRIS.

Sworn to before me this 15 day of January, 1917.

JOHN T. STURDEVANT,

Notary Public, N. Y. Co.

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GROUP No. 2.

Affidavit of Frank H. Ward.

United States District Court, Southern District of New York.

THE ASSOCIATED PRESS, Complainant,

against

INTERNATIONAL NEWS SERVICE, Defendant.

STATE OF NEW YORK,

County of New York, ss.:

Frank H. Ward, being duly sworn, deposes and says:

I reside at No. 98 Bender Avenue, East Cleveland, Ohio. I am at present employed by the International News Service as Manager of its Cleveland Bureau. I first entered the employment of the International News Service as the Manager of its Cleveland Bureau on or about November 17th, 1916.

I was employed to take charge of that Bureau by Roy D. Moore, the Western Business Manager of the International News Service, whose headquarters are at Chicago. Mr. Moore was acting for Mr. Farris, the Day News Manager of the International News Service. When I came to Cleveland, the offices of the Cleveland Bureau were located, and now are located, in a single room at No. 720 The Arcade, Cleveland, Ohio. The Manager of the Cleveland Bureau before me was

Fred W. Agnew. When I first came to the Cleveland office,
219 the following were the employees of that office and their respective duties:

(1) Fred W. Agnew, Bureau Manager. Mr. Agnew familiarized me with the workings of the office for the first few days I was there, then was given a position as telegraph operator on the trunk wire from New York to Chicago over which is transmitted all news of the world, except that originating in the State of Ohio. His duties were to keep all matter coming over the trunk wire and to send from Cleveland all matter originating in Cleveland or on the Ohio circuit, which joins the trunk wire at Cleveland, which, in the judgment of Mr. Ward, was worth transmitting out of Cleveland. As the news items came over the wire, Agnew would write them on a typewriter, making about six copies, which were then distributed, one to me, one

to the Ohio operator, who, in turn, sent it out to the papers on his wire, one to the Cleveland Leader, one to the Cleveland News, one to a Hungarian paper, and the other to the office files. Mr. Agnew's hours of duty were from 10 a. m. to 6 p. m. daily. My hours of duty were from 8 a. m. to 4 p. m.;

(2) Edward C. Campbell, who was employed as operator on the Ohio State wire;

(3) A man by the name of Phillips, who was an operator on the trunk wire, who, however, was only employed for two days after I got there, when he was relieved, Agnew taking his place;

(4) Bradley Smith, an office boy;

(5) George R. Simmons, operator on the trunk wire from 6 p. m. to 2 a. m.;

(6) George Hatti, operator on the trunk wire from 2 a. m. to 10 a. m.

220 We also employed B. E. Cushing and T. J. Thomas, associated with the Cleveland News. The first time that I learned that B. E. Cushing was an employe of the International News Service, was when I substituted for Agnew, during Agnew's vacation in the summer of 1916; I then learned for the first time that Cushing was employed to notify the Cleveland Bureau of the International News Service of any local news, promptly, which originated in Cleveland or vicinity, and which came to him or to the Cleveland News, and which the Cleveland News would naturally carry; I also learned at this time from Agnew that Mr. Cushing occasionally called him on the telephone and told him that The Associated Press was carrying such and such a story. While I was so substituting for Agnew, during the summer, the said Cushing called me on the telephone several times and tipped me off to certain stories which had come into the offices of the Cleveland News, through the Associated Press. He also, of course, gave me a number of items of news originating in Cleveland and vicinity. At that time, so far as I can remember, I did not send over the wire to the International News Service any information given me by Cushing, relative to Associated Press stories.

After I became Manager of the Cleveland Bureau of the International News Service, when I was tipped off that the A. P. was carrying a certain story, I would at once message New York, with the idea of getting an International News Service story for the Cleveland News, and for my Ohio State wire, so that I could legitimately serve our own subscribers with the same story that the A. P. had. Cushing never read me the A. P. story or bulletin, so far as I know; all he ever gave me was a tip as to the nature, character and source of the story. It was up to us to get our information, then, as best we

221 could. With but two exceptions, which I will refer to hereafter, I never sent out to any subscribers or takers of our service, but only to the New York office of International News Service, any information whatsoever as to these tips. Our subscribers never got the story, except in the two instances above referred to, for the reason that my messages were never copied by any operator except the one in the New York office, and because we did not send out any news other than our own.

The two exceptions to which I referred above, were these:

(1) An explosion in a powder plant in Peterboro, Ont., took place, and I put it on the wire in the form of a bulletin such as would be copied by all clients. In this case, I am pretty sure I rewrote this bulletin from the edition of a newspaper, and did not get it from Cushing:

(2) The other instance, above referred to, was the story of a mine cave-in near Birmingham, Ala. In that case, Cushing called me up and said, "Have you got the one o'clock edition yet of the Cleveland News?" (The office boy would purchase, as soon as issued, each edition of the Cleveland Press on the street and would get an edition of the Cleveland News from the Cleveland News press room as soon as it was issued, and would rush these editions to me as soon as possible.) I said "No." He said, "When it comes over, you will find an account of a mine explosion out in Alabama." I asked the boy why he had not brought to me the one o'clock edition, and he said that it was a little late and not out yet. I told him to watch for it in the press room of the Cleveland News and to bring it to me at once, when he got it. He did this, and I found a story carrying a Birmingham, Ala., date line, in which it said that there had been a mine explosion near there, and that it was feared that many were dead. I rewrote

222 the story from the published paper, placing a Birmingham date line on it, and put it on the wire as a bulletin. In a minute or two I was sharply reprimanded by a message from New York, signed "B. F.," on the ground that it was not my business to put anything on the wire, as news, which did not originate in my own district.

I might state that it was my course of conduct in the Cleveland Bureau of the International News Service to call up Mr. Cushing at the Cleveland News whenever a flash, bulletin or story of importance came over either our trunk or state leased wire and inform him of the contents. The reason why I would call Mr. Cushing up on the telephone was because the Cleveland Bureau of the International News Service was in another building than that in which were located the offices of the Cleveland News, and unless I called him up, it was necessary to send an office boy with the news item, which was slower.

FRANK H. WARD.

Sworn and subscribed to before me, this 10th day of January, 1917.

JOHN T. STURDEVANT,
Notary Public, New York County.

Affidavit of Frank H. Ward.

United States District Court, Southern District of New York.

THE ASSOCIATED PRESS, Complainant,

against

INTERNATIONAL NEWS SERVICE, Defendant.

STATE OF NEW YORK,

County of New York, ss.:

Frank H. Ward, being duly sworn, deposes and says:

I reside at No. 98 Bender Avenue East, Cleveland, Ohio. I am the manager of the Cleveland Bureau of International News Service. I have read the affidavit of Melville E. Stone, verified January 3, 1917, and the affidavit of Fred W. Agnew, verified December 28, 1916, made and entitled in this action, and am familiar with the contents thereof.

Referring to the matters set forth on page 2-a of the affidavit of said Agnew, in regard to the sinking of the Hospital Ship *Britanic*, the facts are these: When I first saw a copy of the International News Service report which was sent over a trunk wire between New York and Chicago, and which passed through the Cleveland Bureau office and through my hands, which referred to the ship as the *Britania*, I had before me a printed and published newspaper containing an Associated Press despatch which gave the name of the ship as the *Britanic*. I thereupon caused to be sent to the New York office a message saying, in substance, that the Associated Press news
224 referred to the ship as the *Britanic*. I received no message about this matter from anybody connected with the Associated Press or the Cleveland News. My sole information was the published story in a newspaper which I saw.

Referring to page 3 of the Agnew affidavit and the matter therein set forth in relation to the Adamson Eight Hour Law, the facts are that a news despatch came over the trunk wire from the Chicago Bureau of the International News Service, with a date line of Kansas City, which, in substance, stated that at Kansas City the Adamson Law was declared constitutional and the injunction was dismissed. On receiving this despatch I immediately called up Cushing of the Cleveland News to tell him its contents so that the Cleveland News could issue an extra or special edition if they chose. Cushing then told me that they had been informed by the Associated Press that the Adamson Law had been held unconstitutional instead of constitutional, as the International News Service had it. I immediately sent a message to Mr. Faris stating that the Associated Press had flashed a message that the Adamson Law had been held to be unconstitutional. Subsequently the Chicago office of the International News Service issued a despatch under a Kansas City date line that the Adamson Law had, in fact, been held to be unconstitutional.

Referring to the matter at the top of page 4 of Agnew's affidavit, relating to the burning of the steamer Powhatan, the facts are that on or about November 25, 1916, Mr. Cushing telephoned me and said that the Cleveland News had a bulletin from the Associated Press, in substance that the passenger steamer Powhatan had caught fire and had sent out a wireless for assistance, and asked me if I could

225 furnish him with the International News Service story of the same event in time for the first edition of the Cleveland News which goes to press about nine a. m. I told him that this

story had not been filed by the International News Service, by its Western wire as yet, but that I would have them hurry it on ahead of other news. I then sent a message to New York, in substance advising them that the Associated Press had issued a bulletin to the effect that the steamer Powhatan was afire off Block Island. Within a short time thereafter the International News Service sent out the bulletins at the bottom of page 4 of said affidavit, which, as I am advised, were sent out by them from information which they obtained from New York City from the offices of the Company owning or operating the Powhatan. In this connection I wish to point out that the Cleveland News takes the entire leased wire service of both the International News Service and the Associated Press. Mr. Cushing knew, and has known, that the wire service of the International News Service is faster than the Associated Press wire service and on numerous occasions, when near to the time of publishing an edition of the Cleveland News, and when he has received some partial or incomplete story from the Associated Press, he has called me up and asked me to hurry to him the full report of the event of the International News Service, so that the Cleveland News could print a full and detailed story of the particular event in the next edition. It not infrequently happens that owing to the mass of material collected for distribution at the New York office of the International News Service, a particular story in which some Western newspaper may be interested, will not come over the wire until it has been preceded by other stories which the New York office may think of more importance. For this reason it has been my custom whenever I could do it, to accommodate our clients when advised of their wishes, to message New York to put on the wire the particular story in

226 which they are interested, first, so that they might have the advantage of publishing it as early as they wished to. That was the case with regard to the story of the burning of the steamer Powhatan.

Referring to the matter in Agnew's affidavit at the bottom of page 8, and to the despatch sent by me to the New York office of the International News Service, which is set forth at the top of page 9, the facts are to the best of my recollection, that I saw, prior to the time that I sent said message to New York, said despatch, or the substance thereof, in one of the afternoon papers then printed and on sale in Cleveland, Ohio.

Referring to page 12 of the Agnew affidavit, which sets forth certain despatches referring to a mine disaster near Birmingham, Alabama, the facts, to the best of my recollection, are that on December

20, 1916, Cushing called me up on the telephone and asked me if I had yet seen an edition of the Cleveland News which, he stated, contained a story of an account of a serious mine disaster in Alabama. I then told my office boy to obtain the issue of the Cleveland News and bring it to me. He did this and I found a story containing the substance of the matter set forth on page 12 of the Agnew affidavit. I then rewrote that story from the published paper and sent it out to the clients of the International News Service, over the wire. Very shortly thereafter, I received a message and instruction from the New York office of the International News Service that I must, under no circumstances, send out such a bulletin or rewrite news.

FRANK H. WARD.

Sworn to before me this 10th day of January, 1917.

JOHN T. STURDEVANT,

Notary Public, New York County.

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Affidavit of E. A. Smiley.

United States District Court, Southern District of New York.

THE ASSOCIATED PRESS, Complainant,

against

INTERNATIONAL NEWS SERVICE, Defendant.

STATE OF OHIO,

County of Cuyahoga, ss:

Before me, Harry L. Deibel, a Notary Public in and for said County and State, personally appeared E. A. Smiley who, being first duly sworn, says that he was for upwards of three (3) years in the employment of the Cleveland News, which receives the wire service of the Associated Press and the International News Service; that said services began a few weeks before March 25, 1913, and terminated about February 1, 1916, when he resigned to engage in publicity and advertising business; that during the term of said employment he edited telegraph copy of both the Associated Press and International News Service; that during this time the alliant and B. E. Cushing, telegraph editor of the Cleveland News, worked at the same horse-shoe shaped desk on the 14th floor of the Leader-News Building, in the City of Cleveland, Ohio; that this desk was about twelve (12) feet across at its widest point, and that any one sitting at any point of this desk would not be over twelve (12) to fourteen (14) feet distant from any other person sitting at said desk; that at said

228 desk all telegraph and local copy which goes to make up the news columns of the Cleveland News was edited; that said B.

E. Cushing always talked in a high pitched voice, which carried a long distance; that said B. E. Cushing, besides acting as telegraph editor during this time also was in the employ of the Associ-

ated Press and received for the latter service a compensation of Ten Dollars (\$10.00) per week; that this fact is known to affiant because he was told it by said Cushing; that in return for this compensation said B. E. Cushing, besides giving to the Associated Press stories originating in Cleveland and surrounding territory, called up their office on the telephone when some story of great importance was carried on the wires of the International News Service and which had not yet appeared in the copy sent to the above described horse-shoe desk by the Associated Press and in a way which could be construed as a tip, inquired if the said Associated Press knew anything about the story;

Affiant further says that while in the employ of the Cleveland News he, at the request of said B. E. Cushing, protected the Associated Press in the above manner during the hours from 2 to 6 p. m., or the balance of the time during which the day wire of the Associated Press is in operation, after Cushing's hours were through;

Affiant further says that the manner in which the tips referred to above were conveyed to the Associated Press was as follows: When an item of news came in on the International News Service report that was not contained in the Associated Press report, affiant or Cushing would call up the Manager of the Associated Press, and say, for example:

"Hearst says forty dead in New York shirt waist fire. What have you?"

Affiant further says that he distinctly remembers that one day, when he was substituting for Cushing, after Cushing had
229 quit for the day, the Cleveland News had prepared *an* advance to issue instantly an extra edition immediately upon the death of Pope Pius, who for some time had been very ill; that the Associated Press on this afternoon carried a flash, reading "Pope dead"; that on this information the Cleveland News issued and circulated an extra edition, announcing the death of the Pope; that at this time and for some time afterward, the International News Service carried bulletins, declaring the Pope was sinking rapidly but insisting he was still alive. When the rival paper of the Cleveland News failed to issue an extra edition, announcing the Pope's death, the Associated Press was asked by affiant whether it was positive that its "death" bulletin was absolutely correct. Some time after this conversation a similar conversation was held between affiant and the Associated Press, in course of which affiant told the Associated Press in reply to a question "what does Hearst say?", that the International News Service insisted the Pope was still alive; that the Associated Press at that time said to affiant "Hearst has good connections in Rome." As a matter of fact, the International News Service bulletin was correct and Pope Pius did not die until early the next morning, Cleveland time;

Affiant further says that on many occasions information as to the nature of news carried on the International News Service wire has been communicated to the Associated Press by Mr. Cushing or himself, in advance of publication of said news in any edition of the Cleveland News, but owing to the lapse of time and the pressure of

other duties he is unable to recall any specific instances at this time:

Affiant further says that as compensation for his services to the Associated Press he received from the said B. E. Cushing 230 Three Dollars (\$3.00) per week; that the said B. E. Cushing informed him that said Three Dollars (\$3.00) was a part of the Ten Dollars (\$10.00) received each week by the said B. E. Cushing from the Associated Press;

Affiant further says that in the summer or early fall of 1915, when he relieved B. E. Cushing as telegraph editor, while the said B. E. Cushing was on his annual two weeks' vacation, he received from the Associated Press Ten Dollars (\$10.00) per week; that the Ten Dollars (\$10.00) was sent up to him from the Associated Press offices on the 8th floor of the Leader-News Building, in an envelope and that it was in currency; that the envelopes containing the said Ten Dollars (\$10.00) on each of the two occasions was brought to him by a boy whom he knew and recognized as an Associated Press office boy;

Affiant further says that at the time he resigned from the Cleveland News, on or about February 1, 1916, the said agreement between the Associated Press and B. E. Cushing was still in effect;

Affiant further says that the Associated Press, during the time that he was employed on the Cleveland News, had access to the proofs of copy edited and headed for publication in the Cleveland News; that said privilege enabled the Associated Press to see such proofs before the news contained in such proofs had been published in the Cleveland News; that proofs were taken of local stories, or stories originating in Cleveland and surrounding territory; of telegraph and cable stories which had come in over the International News Service wires and of telegraph and cable stories which had come in over the Associated Press wires;

Affiant further says that he recalls that when Joe Glass was manager of the Cleveland Bureau of the Associated Press, Glass frequently came to the desk of the Managing Editor of the Cleveland News, on which a complete file of all proofs of articles for 231 publication in the Cleveland News was kept, and looked over and read such items of news as he was interested in.

Further affiant sayeth not.

E. A. SMILEY.

Sworn to before me and subscribed in my presence this 11th day of January, 1917.

HARRY L. DEIBEL.

[SEAL.] *Notary Public in and for said County and State.*

THE STATE OF OHIO,

Cuyahoga County, ss:

I, Edmund B. Haserodt, Clerk of the Court of Common Pleas, a Court of Record of Cuyahoga County, aforesaid,

Do hereby certify that Harry L. Deibel before whom the annexed acknowledgment, oath, affidavit, was taken, was at the date thereof

a Notary Public in and for said County, duly authorized by the laws of Ohio to take the same, also to take acknowledgments, affidavits and proofs of deeds or conveyances for land, tenements or hereditaments situated and lying in said State of Ohio, and further that I am well acquainted with his handwriting and believe his signature thereto is genuine, and that the annexed instrument is executed according to the laws of the State of Ohio.

Commission expires July 19, 1917.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court, as Cleveland, this 12 day of Jan. A. D. 1917.

No. 4176.

[SEAL.]

EDMUND B. HASERODT, *Clerk.*

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Affidavit of E. A. Smiley.

United States District Court, Southern District of New York.

THE ASSOCIATED PRESS, Complainant,

against

INTERNATIONAL NEWS SERVICE, Defendant.

STATE OF OHIO,

County of Cuyahoga, ss:

Before me, Harry L. Deibel, a Notary Public in and for said County and States, personally appeared E. A. Smiley, who, being first duly sworn, says that he was for upwards of three years in the employment of the Cleveland News, which receives the wire service of the Associated Press and the International News Service; that during the term of such employment he edited telegraph copy of both the said Associated Press and International News Service; that B. E. Cushing, telegraph editor of the said Cleveland News also acted as correspondent for the Associated Press, and received for such services a compensation of ten dollars (\$10.00) per week; that in return for this compensation, said B. E. Cushing, besides giving to The Associated Press stories originating in Cleveland and surrounding territory, called up their office on the telephone when some story of great importance was carried on the wires of the International News Service and which had not yet appeared in the copy sent to the telegraph desk by The Associated Press and in a way which might be construed as a tip, inquired if they knew anything about said story;

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Deponent further says that while in the employ of the Cleveland News he, at the request of said B. E. Cushing, protected The Associated Press in the above manner during the hours 2 to 6 P. M., or the balance of the time during which the

day wire of The Associated Press is in operation after Cushing's hours are through.

Deponent further says that as compensation for the above services, he received from the said B. E. Cushing three dollars (\$3.00) per week; that the said B. E. Cushing informed him that said three dollars (\$3.00) was a part of the ten dollars (\$10.00) received each week by the said B. E. Cushing from the said Associated Press.

Deponent further says that he tendered his resignation to the Cleveland News on or about February 1st, 1916, and at the time of the termination of said services, the agreement of The Associated Press and B. E. Cushing was still in effect.

Deponent further says that he is informed and believes that said agreement between said B. E. Cushing and said Associated Press is now in effect.

Further alliant sayeth not.

E. A. SMILEY.

Sworn to before me and subscribed in my presence, this 11th day of January, 1917.

[SEAL.]

HARRY L. DEIBEL.

Notary Public in and for said County and State.

(Certification.)

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Affidavit of Benjamin F. Field.

United States District Court, Southern District of New York.

THE ASSOCIATED PRESS, Complainant,

against

INTERNATIONAL NEWS SERVICE, Defendant.

STATE OF OHIO.

County of Cuyahoga, ss:

Before me, Walter F. Smith, a Notary Public in and for said County and State personally appeared Benjamin F. Field who, being first duly sworn, deposes and says:

I live at 1676 Ravenwood Ave., Lakewood, Cuyahoga County, Ohio. I am at present employed by The S. H. Kleinman Realty Co., 315 Garfield Building, Cleveland, Ohio, as Director of Advertising and Publicity. I have held the above position since September 6, 1916, at which time I resigned as Assistant News Editor of The Cleveland News to accept my present position.

For (4) Four years or more prior to Sept. 6, 1916, I was continuously in the service of the Cleveland News which receives the wire service of The Associated Press and The International News Service, and during this period I was intimately acquainted with B. E. Cushing, Telegraph Editor of the said Cleveland News; my

235 duties as Assistant News Editor of the said Cleveland News consisted of copy reading at the Horseshoe-shape desk in the Editorial rooms of the said Cleveland News at which the said B. E. Cushing sat and edited the telegraph copy coming in over the wires of The Associated Press and The International News Service and the making up in the composing room of the said Cleveland News of the forms from which pages of the said Cleveland News were printed.

At the time I severed my connection with the Cleveland News said B. E. Cushing was, besides, being upon the pay-roll of The Cleveland News as Telegraph Editor spending a considerable portion of his time writing and rewriting stories for the Associated Press and very frequently said B. E. Cushing would hand me stories which he had just finished writing and request me to send them down through the pneumatic tubes to the offices of The Associated Press on the 8th floor of the Leader-News Building.

I might say in this connection that pneumatic tubes had been installed between the Associated Press offices on the 8th floor of the Leader-News Building and the Cleveland News Editorial Rooms on the 14th floor of the Leader-News Building, and that the upper terminus of the tubes was one foot from Cushing's elbow.

The chair which I occupied at the said horseshoe-shaped desk, while not making up forms in the composing room, was next to the chair occupied by the said B. E. Cushing and when we were both seated we were elbow to elbow.

The said B. E. Cushing was paid by The Associated Press for his services but in what amount I do not know. I know this to be a fact because upon one occasion I opened the carrier which came up from the Associated Press offices in the pneumatic tube to Cushing's elbow and took from it an envelope and handed it to the said B. E. Cushing. At that time the said B. E. Cushing tore open the said envelope in my presence and took from it some currency. I remarked at the time:

"I wish I had money coming from all directions like some of these fellows around here."

or words to that effect.

During my term of employment on the said Cleveland News there was a rule put into effect which prevented Associated Press employes from going into the composing room for proofs of news, but this rule, of course, did not apply to Cushing in his capacity as Telegraph Editor of the said Cleveland News. It was Cushing's custom to make frequent trips to the composing room to get the proofs just before the closing time of each edition, and after getting possession of the proofs he busied himself at his typewriter writing stories from the said proofs for the Associated Press. These stories were placed in the carrier and shot down the pneumatic tube by the said B. E. Cushing to the Associated Press offices.

Several times daily I saw the said B. E. Cushing take the receiver from the hook on his telephone, ask the exchange girl for the Associated Press, and when the connection was made, say, for example:

"Hearst has a Bulletin on a wreck down state. Can you find anything about it for me?"

Owing to the lapse of time, pressure of other duties and the unimportance I attached to the incidents at the time, I am unable at this time to recall any specific instances.

And further affiant sayeth not.

BENJ. F. FIELD.

Sworn to before me and subscribed in my presence this 12th day of January, 1917.

W. F. SMITH,

*Notary Public in and for Cuyahoga
County, Ohio.*

237 THE STATE OF OHIO:

I, Edmund B. Haseroot, Clerk of the Court of Common Pleas, a Court of Record of Cuyahoga County, aforesaid,

Do hereby certify that W. F. Smith, before whom the annexed acknowledgment, oath, affidavit, was taken, was at the date thereof a Notary Public in and for said County, duly authorized by the laws of Ohio to take the same, also to take acknowledgments, affidavits and proofs of deeds of conveyances for land, tenements or hereditaments situated and lying in said State of Ohio, and further that I am well acquainted with his handwriting and believe his signature thereto is genuine, and that the annexed instrument is executed according to the laws of the State of Ohio.

Commission expires May 18, 1918.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court at Cleveland, this 12th day of January, A. D. 1917.

No. 4181.

[SEAL.]

EDMUND B. HASEROOT, *Clerk.*

238.

Affidavit of Sam B. Anson.

United States District Court, Southern District of New York.

THE ASSOCIATED PRESS, Complainant,

against

INTERNATIONAL NEWS SERVICE, Defendant.

STATE OF OHIO,

County of Franklin, ss:

Before me, C. H. John, a Notary Public in and for said county and state, personally appeared Sam B. Anson, who, being first duly sworn, says that from May, 1912, until June, 1916, he was continuously employed on the Cleveland News as city editor; that from

about April, 1913, to June, 1916, he sat in the "slot" in the horse-shoe desk at which B. E. Cushing, the telegraph editor of the said Cleveland News, also sat; that during this time said Cleveland News received the full leased wire service of International News Service and the full service of the Associated Press; that during this time all the telegraph news received by the Cleveland News was edited at said horse-shoe desk; that affiant remembers numerous occasions generally and several particular occasions on which B. E. Cushing communicated by telephone or otherwise with the Associated Press office in the same building and advised said Associated Press of news stories furnished by International News Service, which he and others in the office had reason to believe were not in the possession of the Associated Press.

239 Affiant further says that he, the affiant, had not then and has not now any feeling but that this practice was proper, and within the rights and duties of the Cleveland News as a member of the Associated Press, a co-operative association of newspapers. The affiant further says that he then regarded, and does now regard, that under the by-laws of the Associated Press, to which the Cleveland News must have subscribed when it first was admitted as a member of the Associated Press, said B. E. Cushing was in duty bound to furnish the Associated Press with all news items, whatever their source.

Affiant further says that the method used by the said B. E. Cushing to communicate with the Associated Press when International News Service was carrying a story which had not yet appeared in the Associated Press bulletins, was either by the telephone or by the pneumatic tube system which communicated between the office of the Cleveland News and the Associated Press office; that when said Cushing used the telephone he would call up the Associated Press office and state, for example: "Hearst is carrying such and such a story out of such and such a place. What have you got on it?"

The affiant further says that said B. E. Cushing, excepting in the intervals when said Associated Press employed a day reporter in its Cleveland office, was understood by him and so far as he knew by all others in the office, to be the accredited day correspondent of the said Associated Press.

Affiant further says that at the present time and since August, 1916, he has been the publisher of the Columbus, Ohio, Monitor, a daily newspaper.

SAM B. ANSON.

Sworn to before me and subscribed in my presence this 13th day of January, 1916.

[SEAL.]

C. H. JOHN,

Notary Public, Franklin County, Ohio.

240 THE STATE OF OHIO,
Franklin County, ss:

I, John B. Miles, Clerk of the Court of Common Pleas, which is a court of record, within and for said County and State aforesaid, do

hereby certify that C. H. John, whose signature, as a Notary Public is attached to the within acknowledgment was, at the date thereof, a duly commissioned and qualified Notary Public in and for said County and as such officer was duly authorized to take acknowledgments of deeds, mortgages, liens, powers of attorney and other instruments of writing, and that I am acquainted with his handwriting, and believe that the signature to the acknowledgment herein is genuine, and that the foregoing instrument is executed according to the laws of the State of Ohio.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at Columbus, this 13th day of January 1917.

[SEAL.]

JOHN B. MILES, *Clerk*.

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Affidavit of Karl Shimansky.

United States District Court, Southern District of New York.

THE ASSOCIATED PRESS, Complainant,

against

INTERNATIONAL NEWS SERVICE, Defendant.

STATE OF OHIO,

County of Cuyahoga, ss:

Before me, D. W. Jones, a Notary Public in and for said County and State, personally appeared Karl Shimansky who, being first duly sworn, deposes and says that he was for nine months continuously employed by The Cleveland News, which receives the wire service of the Associated Press and The International News Service; that the term of such employment began on or about Sept. 1, 1913 and terminated on or about June 1, 1914; that during this period B. E. Cushing was telegraph editor of the said Cleveland News, and in such capacity edited copy coming in over the wires of both the Associated Press and The International News Service.

Affiant further says that from about February 1, 1914 to June 1, 1914 he, affiant, acted as assistant telegraph editor, his superior being the said B. E. Cushing, and that during that time he, affiant, sat at the elbow of the said B. E. Cushing at a horse-shoe shaped desk in the editorial rooms of the Cleveland News on the fourteenth floor of the Leader-News bldg.; that during that period the Associated Press had offices on the eighth floor of the Leader-News bldg.

Affidavit further says that the said B. E. Cushing during the above mentioned period, frequently called up the Associated Press on the telephone when a news item of great importance came in over the wires of the International News Service and had not yet appeared in the manifold sheet sent to the said horse-shoe shaped desk by the said Associated Press, and, outlining the substance of the said International News Service item to the said

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Associated Press, inquired if the said Associated Press "had anything on it."

Affiant further says that the method employed by the said B. E. Cushing in tipping off the said Associated Press as to the contents of the news item carried on the wires of the said International News Service was as follows: Said B. E. Cushing would say, over the telephone to the said Associated Press, for example:

"Hearst says hundred drowned on Steamer Eastland, turned over in Chicago river. What have you?"

Affiant further says that "Hearst" was the nickname for the International News Service used by employes of the said Cleveland News;

Affiant further says that because of the lapse of time, the pressure of other duties, and the unimportance he attached to incidents at the time, he is unable, at this time, to recall any specific instances of International News Service tips telephoned to the said Associated Press by the said B. E. Cushing.

Affiant further says that he is at present employed as a bond salesman for the Bonbright-Herrick Company, Cuyahoga building, Cleveland, Ohio.

And further affiant sayeth not.

KARL SHIMANSKY.

Sworn to before me and subscribed in my presence this 15th day of January, 1917.

[SEAL.]

D. W. JONES,

Notary Public in and for Cuyahoga County, Ohio.

(Certificate of the Clerk of the Court of Common Pleas, a Court of Record of Cuyahoga County, attached.)

243 *Affidavit of Edward C. Campbell.*

United States District Court, Southern District of New York.

THE ASSOCIATED PRESS, Complainant,

against

INTERNATIONAL NEWS SERVICE, Defendant.

STATE OF OHIO,

County of Cuyahoga, ss:

Before me, Harry L. Deibel, a Notary Public in and for said County and State, personally appeared Edward C. Campbell, who, being first duly sworn, says that he was informed by Fred W. Agnew personally that prior to his late employment by International News Service, said Agnew had been employed by The Associated Press at Topeka, Kansas, Findlay, Ohio, Zanesville, Ohio, Cleveland, Ohio, and Chicago, Illinois.

Further, Affiant sayeth not.

EDWARD C. CAMPBELL.

Sworn to before me and subscribed in my presence this 12th day of January, 1917.

HARRY L. DEIBEL,

Notary Public in and for said County and State.

244 THE STATE OF OHIO,
Cuyahoga County, ss:

I, Edmund B. Haserodt, Clerk of the Court of Common Pleas, a Court of Record of Cuyahoga County, aforesaid,

Do hereby certify that Harry L. Deibel before whom the annexed acknowledgment, oath, affidavit, was taken, was at the date thereof a Notary Public, in and for said County, duly authorized by the laws of Ohio to take the same, also to take acknowledgments, affidavits and proofs of deeds or conveyances for land, tenements or hereditaments and lying in said State of Ohio, and further that I am well acquainted with his handwriting, and believe his signature thereto is genuine, and that the annexed instrument is executed according to the laws of the State of Ohio.

Commission expires July 19, 1917.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court at Cleveland this 12 day of Jan. A. D. 1917.

No. 4183.

[NOTARIAL SEAL.]

EDMUND B. HASERODT, *Clerk.*

245 *Affidavit of Edward C. Campbell.*

United States District Court, Southern District of New York.

THE ASSOCIATED PRESS, Complainant,

against

INTERNATIONAL NEWS SERVICE, Defendant.

STATE OF OHIO,

County of Cuyahoga, ss:

Before me, Harry L. Deibel, a Notary Public in and for said County and State, personally appeared Edward C. Campbell, who, being first duly sworn, says that for upward of four years past he had been continuously in the employ of the International News Service as a telegrapher in different parts of the United States; that since May, 1916, he has been continuously employed by the International News Service as a telegrapher in Cleveland, Ohio, office. That for the last three (3) years he has known Fred W. Agnew through communicating with him over the telegraph wire; that for the two and a half (2½) years past he has known said Agnew personally. That in May, 1916, Affiant was transferred to the Cleveland, Ohio office of the International News Service and at said time said Agnew was manager of said office and con-

tinued in said position of manager until November 17, 1916. That about the latter part of October, 1916, Affiant was informed by said Agnew that Agnew made an application to the General Manager of the International News Service for an increase in salary, and that said application was refused. About this time said Agnew began to express a fear that he was losing his prestige with the General Management of the International News Service, and began to express a fear that he would lose his position. About this time the Management of the International News Service also took under consideration the employment of another telegrapher at the Cleveland, Ohio, office, said addition to the force would eliminate the necessity of said Agnew working overtime, and would thereby cause a decrease in his earnings. That about November 17, 1916, said Agnew was demoted from his position as manager of the Cleveland office, but, at his own request was retained as a telegrapher. The facts above set forth aroused great dissatisfaction in said Agnew and as a result he on many occasions made threats to Affiant against the International News Service. Said Agnew stated that if the International News Service gave him a "dirty deal" he would give them the self-same thing, and that he would get square with them. That on one occasion said Agnew, while still manager of the Cleveland office, stated that he hoped the International News Service would lose every client it had and that he was not going to do anything more for them. That said Agnew on many occasions repeated the above threat in different forms, stating that if the International News Service discharged or demoted him he would "do them all the dirt" he could.

Further, Affiant saith not.

EDWARD C. CAMPBELL.

Sworn to before me and subscribed in my presence this 12th day of January, 1917.

247 THE STATE OF OHIO,
Cuyahoga County, ss:

I, Edward B. Haserodt, Clerk of the Court of Common Pleas, a Court of Record of Cuyahoga County aforesaid,

Do hereby certify that Harry L. Deibel before whom the annexed acknowledgment, oath, affidavit, was taken, was at the date thereof a Notary Public in and for said County, duly authorized by the laws of Ohio to take the same, also to take acknowledgments, affidavits and proofs of deeds or conveyances for land, tenements or hereditaments, situated and lying in said State of Ohio, and further that I am well acquainted with his handwriting and believe his signature thereto is genuine, and that the annexed instrument is executed according to the laws of the State of Ohio.

Commission expires July 19, 1917.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court at Cleveland, this 12 day of Jan. A. D. 1917.
No. 4184.

EDMUND B. HASERODT, *Clerk.*

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Affidavit of George T. Hattie.

United States District Court, Southern District of New York.

THE ASSOCIATED PRESS, Complainant,

against

INTERNATIONAL NEWS SERVICE, Defendant.

STATE OF OHIO,

County of Cuyahoga, ss:

Before me, Harry L. Deibel, a Notary Public in and for said County and State, personally appeared George T. Hattie, who being first duly sworn, says that he has known Fred W. Agnew for the last ten years; that in November, 1916, affiant was transferred to the Cleveland office of the International News Service, of which office said Agnew had just been demoted from managership and was then working as a telegrapher; affiant noticed that said Agnew was particularly embittered against International News Service and that during the time affiant and Agnew were in the Cleveland office of International News Service said Agnew would fly into a rage at the slightest annoyance. Said Agnew stated to affiant that he had a grievance against Barry Faris, then general news manager of the International News Service.

Affiant further says that the said Fred W. Agnew said to him a few days before he quit that had he known that the "early morning trick," which was from 2 a. m. to 10 a. m. was to be discontinued at the Cleveland office he would not have resigned but would
249 have remained on the job so as to secure the extra time, from 7 to 10 a. m.

And further affiant sayeth not.

GEORGE T. HATTIE.

Sworn to and before me and subscribed in my presence this 12th day of January, 1917.

HARRY L. DEIBEL,

Notary Public in and for Cuyahoga County, Ohio.

THE STATE OF OHIO,

Cuyahoga —, ss:

I, Edmund R. Haserodt, Clerk of the Court of Common Pleas, a Court of Record of Cuyahoga County aforesaid,

Do hereby certify that Harry L. Deibel before whom the annexed acknowledgment, oath, affidavit, was taken, was at the date thereof

a Notary Public, in and for said County, duly authorized by the laws of Ohio to take the same, also to take acknowledgments, affidavits and proofs of deeds or conveyances for lands, tenements or hereditaments situated and lying in said State of Ohio, and further that I am well acquainted with his handwriting and believe his signature thereto is genuine, and that the annexed instrument is executed according to the laws of the State of Ohio.

Commission expires July 19, 1917.

In Testimony whereof I hereunto subscribe my name and affix the seal of said Court at Cleveland this 12 day of Jan. A. D. 1917.

No. 4186.

[NOTARIAL SEAL.]

EDMUND B. HASERODT.

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Affidavit of Benjamin E. Cushing.

United States District Court, Southern District of New York.

THE ASSOCIATED PRESS, Complainant,

against

INTERNATIONAL NEWS SERVICE, Defendant.

STATE OF OHIO,

County of Cuyahoga, ss:

Before me ———, a Notary Public in and for said County and State, personally appeared Benjamin E. Cushing, who, being first duly sworn, says that he has read the affidavit of Fred W. Agnew, herein, verified the — day of ———, 191-, and that he is the Cushing referred to in said affidavit; that in the case of the Adamson Law decision, the Associated Press and International News Service carried contradictory reports and he notified both the Associated Press and International News Service of the conflict and asked both Services to verify their stories, so as to avoid having the News print a story containing incorrect facts.

Affiant further says that the rules of the Associated Press prevented the News from printing before 10:00 a. m. any news item carried on the Associated Press wire; that in the case of the sinking of the "Powhatan," mentioned in said affidavit of said Agnew, affiant, not being able to use the Associated Press story for the
251 first edition of the News, which went to press at 9:00 a. m., asked the I. N. S. if it could furnish a story about the "Powhatan" so that the News could carry the story in the first edition.

Affiant further says that to the best of his recollection he inquired of the International News Service concerning the explosion in the Quaker Oats Plant at Peterboro, Ont., on December 11th, 1916, referred to in the affidavit of said Agnew, because he considered it an important story and the news item carried by the Associated Press

was very meager, and he desired a more detailed story for the Home Edition of the News, going to press at 12:25 p. m.

Affiant further says that during the time he had an arrangement for supplying news to the International News Service he seldom volunteered tips to the Manager of the Cleveland Office of the International News Service, and that there were periods of days and weeks at a time during which he would not furnish anything; affiant further says that during the entire period of approximately a month, covered by the affidavit of said Agnew, there are only two cases where he can definitely remember that such information originated with him.

Further affiant sayeth not.

B. E. CUSHING.

Sworn to before me and subscribed in my presence, this 15th day of January, 1917.

W. R. WALKER.

Notary Public in and for said County and State.

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GROUP NO. 3.

Affidavit of William G. Warnock.

United States District Court, Southern District of New York.

In Equity. No. —.

THE ASSOCIATED PRESS, Complainant,

against

INTERNATIONAL NEWS SERVICE, Defendant.

UNITED STATES OF AMERICA,

Southern District of New York,

County of Onondaga, City of Syracuse, ss:

William G. Warnock, being duly sworn, deposes and says that he is the Bureau Manager for Central New York for the International News Service, defendant herein, and resides at Syracuse, Onondaga County, New York; that heretofore and on May 7th, 1915, on the day that the Cunard steamship Lusitania was sunk in British waters, the International News Service leased wire was connected by loop into the Onondaga County Court House located at Syracuse, New York, and that the Barnes-Roosevelt trial was then on; that the Associated Press leased wire was also looped into the Onondaga County Court House at said time; that together with other telegraph circuits those two wires were located in what was then known as the telegraph room; that said room was a small room given over to the telegraph companies and press associations for the purpose of

253 handling the news of the aforementioned trial; that the instruments of the Associated Press and of the International

News Service located in said room and located upon their respective circuits were placed only a few feet apart; that both press associations employed their own telegraphers; that a certain Mr. Wilson operated the Associated Press instruments at that point and that Mr. V. H. Loomis operated the International News Service instruments at that point; that between 2:30 and 3 o'clock or shortly thereafter on said day, the aforementioned Wilson came to your deponent at the Herald office in said city, at which place your deponent was operating the International News wire and that there then ensued a conversation between said Wilson and your deponent concerning the sinking of the Lusitania. The Herald was served at the time by both these news agencies and your deponent, feeling that the International News Service report of the disaster had been much in advance of the Associated Press which also served the Herald, because of the immediate and constant demand of the Editors of the Herald for your deponent's copy coupled with the fact that the evening edition of the Herald carried the International News Service report of the disaster, intimated to the said Wilson that the International News Service seemed to have beat the Associated Press on the story of the sinking; that said Wilson replied to your deponent then and there "Yes I was in the telegraph room at the Court House and heard your (The International News Service) 'flash,' and the start of the story, but noticed that there was nothing coming on our wire. I tipped them (The Associated Press) off on it and they seemed pretty d— glad to get the tip." That said Wilson later in said conversation said to your deponent in words or substance that the International News Service must have been at least half an hour ahead of the Associated Press on the story, and implied that his tip had worked well. Later your deponent asked

254 Mr. Loomis heretofore mentioned whether Wilson had heard the Lusitania story going over our wire and he (Loomis) stated that he (Wilson) had, and that he (Loomis) believed that Wilson had told the New York office of the Associated Press about it. Your deponent further says that about the same time and during the said Mr. Wilson's stay in Syracuse, an explosion occurred which at first reports indicated that many persons had been killed in Solvay; that your deponent was handling said story over the International News Service leased wire and that said Wilson came into your deponent's room. That said Wilson said in words or substance to your deponent that he (Wilson) wondered if the Associated Press had anything on that (Meaning the Solvay explosion story). That said Wilson immediately left your deponent's room and that your deponent learned later that the Associated Press had been covered on the story shortly after said Wilson left your deponent's office. That thereafter said Wilson stated to your deponent that it was his duty to see that the interests of the Associated Press were looked after in the matter, and that he (Wilson) had attended to it.

WILLIAM G. WARNOCK.

Subscribed to before me this 11th day of January, 1917.

H. F. DIERKES,

Comsr. of Deeds, Syracuse, N. Y.

STATE OF NEW YORK,

Onondaga County Clerk's Office, ss:

I, Henry S. Whitney, Clerk of said County, and of the Supreme and County Courts therein, which are Courts of Record do hereby certify that H. F. Dierkes, whose name is subscribed to the
255 Jurat of the annexed instrument, was at the time of taking such proof of attestation, a Commissioner of Deeds in and for the City of Syracuse, said county, and duly authorized to take the same; and that I am well acquainted with his handwriting and verily believe the signature to said Jurat to be genuine.

In testimony whereof, I have hereunto set my hand and affixed the seal of said County and Courts, at the City of Syracuse, this 11th day of January, 1917.

HENRY S. WHITNEY, *Clerk.*

Affidavit of Henry E. Leary.

United States District Court, Southern District of New York.

THE ASSOCIATED PRESS, Complainant,

against

INTERNATIONAL NEWS SERVICE, Defendant.

STATE OF OHIO,

County of Summit, ss:

Before me, D. H. Holloway, a Notary Public in and for said County and State, personally appeared Henry E. Leary, who being first duly sworn says that he has been a press telegrapher for the last twelve years and that during said time he has worked the wires of the Associated Press, International News Service, United Press, and
256 Afternoon Press Association; that from June 25, 1905, until some time in the year 1911 affiant worked for the Associated Press as a press telegrapher continuously, with the exception of three months; that during the above time affiant worked eleven months at Titusville, Pa.; that from August 1, 1906 to September 21, 1906, affiant worked as a vacation relief man on the Associated Press news wires at Springfield, Ohio, Piqua, Zanesville, and Norwalk, Ohio; that on September 24, 1906 affiant located permanently at Canton, Ohio, as an Associated Press operator on the Canton Repository; that on March 28, 1908, he was transferred to Akron, Ohio, where he worked as an Associated Press operator on the Beacon Journal until the Saturday before Easter, 1910, when affiant resigned

and did no news telegraph work until about January 12, 1913, when he was again employed in the Columbus, Ohio Bureau of the Associated Press, where he worked as telegrapher until Saturday night before Labor Day, 1915, when he went to Newark, Ohio, as an Associated Press telegrapher on the Newark Advocate, where he remained until February 28, 1916.

Affiant further says that during the time of his above described services as Associated Press telegraph operator it was customary for messages to come over the Associated Press wires stating, "The opposition has such and such a story out of such and such a place." That the above described messages originated at Detroit, Cleveland, Columbus, Pittsburgh and many other points: In fact it was customary for any Associated Press office which discovered that the opposition was carrying a story which the Associated Press was not carrying to notify the Associated Press headquarters, or any of its branch offices which might be able to follow up the tip. Affiant further says that these tips were considered to be of such importance that any Associated Press operator wishing to send such a tip was authorized by the rules of the Associated Press to break in on the middle of any news item. The operator having such a tip would promptly signal, "95" over the wire, and this indicated that according to the rules of the Associated Press the sender had a message entitled to precedence over any other message whatsoever. That on many occasions affiant recalls that Associated Press operators at two or more different points on the Associated Press wires would contend for the circuit at the same time in an endeavor to inform the A. P. headquarters or the point of origin of the story that the opposition was carrying a news item which had not appeared as yet on the A. P. wire.

Affiant further says that while employed as Associated Press operator on the Newark, Ohio, Advocate, he followed this procedure himself and secured and sent out news tips which had not as yet appeared on the Associated Press wire, and affiant states that in sending out said tips he was performing what he considered to be his duty to the Associated Press, and what the Associated Press expected of him.

Affiant further states that Associated Press operators are instructed verbally and by means of printed rules and regulations that they are supposed to transmit over the A. P. wires to the A. P. headquarters any and all news which may come into their possession, and during all the period of his employment by the Associated Press he never heard that this news was supposed to exclude news furnished by International News Service or any other news agency.

Further affiant sayeth not.

HENRY E. LEARY.

Sworn to and subscribed in my presence this 13th day of January, 1917.

[SEAL.]

D. H. HOLLOWAY,

Notary Public in and for said County and State.

258 THE STATE OF OHIO,
County of Summit:

I, Bert C. Garman, Clerk of the County of Summit (and also Clerk of the Common Pleas Court and of the Court of Appeals, the same being courts of record of the aforesaid county, having by law a seal) do hereby certify that D. H. Holloway whose name is subscribed to the attached certificate of acknowledgment, proof or affidavit, was at the time of taking such acknowledgment, proof or affidavit, a Notary Public duly commissioned and sworn and residing in said county, and was, as such, an officer of said state, duly authorized by the laws thereof to take and certify the same, as well as to take and certify the proof and acknowledgment of deeds and other instruments in writing to be recorded in said state, and that full faith and credit are and ought to be given to his official acts; and I further certify that I am well acquainted with his handwriting and verily believe that the signature to the attached certificate is his genuine signature.

In witness whereof, I have hereunto set my hand and affixed my official seal this 13 day of Jany. 1917.

[SEAL.]

BERT C. GARMAN, *Clerk.*

259 *Affidavit of Kent R. Cochran.*

United States District Court, Southern District of New York.

THE ASSOCIATED PRESS, Plaintiff,

against

INTERNATIONAL NEWS SERVICE, Defendant.

STATE AND COUNTY OF NEW YORK, ss.:

Kent R. Cochran, being duly sworn, deposes and says:

I reside at No. 1219 Connecticut Avenue, N. W., Washington, D. C.

I am at present employed by the Pacific News Service, as its Washington correspondent, with an office at No. 1112 Munsey Building, Washington, D. C. I have been employed by the Pacific News Service since March, 1915. Prior to the time I entered the employ of the Pacific News Service, I was employed, for about a year, as Manager of the branch office of the Western Union Telegraph Company, located in the offices of the San Francisco Call.

While acting as Manager of the Western Union branch office, during the year 1914-1915, my office was in the editorial rooms of the San Francisco Call & Post. The San Francisco Call & Post was a member of The Associated Press and took its news service; that news service came over a wire and was received in the editorial rooms aforesaid by an Associated Press operator, who would, as the

260 messages came in, write them on a typewriter, from whence they went to a member of the editorial staff of that paper.

The desk at which the Associated Press operator received his dispatches was directly opposite to my desk and we were located within a few feet of each other; he could hear my instrument working and I could hear his. I could read his messages and he could read mine. During a period of about two months, in the spring or summer of 1914, I first witnessed the tipping off to the Associated Press by their operator, Mr. C. E. Cox, who, as I have stated before, was stationed in the same small office where I was located.

During the period of time to which I have just referred, there was a direct wire between the Chicago Bureau of the International News Service and the office of the Los Angeles Herald, in the City of Los Angeles, Cal., over which wire the International News Service transmitted news reports to the Los Angeles Herald. At the same time, there was a Western Union wire between the office of the Los Angeles Herald and the office of the San Francisco Call, over which the important parts of the International News Service report were sent to the San Francisco Call, for its use. I received these news messages and understood, and the Associated Press operator in the Call office, adjoining my desk, also understood, that it was news service furnished by the International News Service. As I received this International News Service report, I type-wrote the same and caused it to be delivered to the editor of the San Francisco Call & Post. Frequently, when an important International News Service story came over the wire to me, I mentioned the fact to Cox, either voluntarily or in response to a question from him as to what the story was, and Cox immediately sent the substance of the International News Service story over the Associated Press wire to the western headquarters of The Associated Press, in Chicago, and it was also received at the offices of The Associated Press at Denver and San Francisco. I heard him do this frequently. These tips which Mr. Cox would send out to the Chicago office of The Associated Press were, in fact, sent out by him prior to the time when any edition of the San Francisco Call & Post had been published.

Mr. Cox resigned his position as Associated Press operator some time during the summer of 1914, and his position was taken by H. S. Muggeridge. He continued to frequently receive from me and to send out in the same manner I have above described, International News Service news to the Central Offices of The Associated Press.

Some one, in the fall of 1914, informed Mr. Coblenz, who was then Managing Editor of the Call & Post, that The Associated Press was receiving tips as to exclusive items of news furnished by the International News Service, which had emanated from the Associated Press operator in the Call & Post office. Mr. Coblenz sent for me and asked me what I knew about it. As telegraphers usually stand together, and there is more or less of a fraternal feeling among them, I felt that I wanted to do what I could to protect Muggeridge, because I was afraid that he might lose his job if the thing were

discovered and I told Mr. Coblentz, for this reason, that I knew nothing about his taking and sending out International News Service matter.

I at once told Mr. Muggeridge, however, of my interview with Mr. Coblentz, and told him that he ought to at once discontinue this practice. Muggeridge told me that he would do so and I supposed that he had. I was not thereafter aware that he was sending out tips to The Associated Press on International News Service

matter until sometime later Mr. Coblentz again came to me
262 and, at the same time, questioned Muggeridge as to whether

Muggeridge had been sending out this matter in the manner above described. Muggeridge denied that he had sent out to The Associated Press any tips on International News Service news and I also denied it and I was sincere in my denial, because I believed that Muggeridge, after promising to stop sending out this material, had, in fact, done so. Two or three days later, the office boy came into the room where Muggeridge and I were at our desks, and told us that Mr. Kellogg, publisher of the newspaper, wanted to see us both in his private office. We went in there and Mr. Coblentz was present. Mr. Kellogg asked me if I had the day before received a certain story relating to sporting events, and I answered that I had. This story had come in from the International News Service, over the wire between the Herald and Call-Post offices, and had been received by me. Mr. Kellogg then asked Mr. Muggeridge if he had tipped the story off to the Chicago office of The Associated Press. Muggeridge denied that he had done so. A few minutes later and as soon as we got back to our office, Mr. Muggeridge told me that he had in fact, tipped off the Associated Press to the story above referred to and he then told me for the first time, and that was the first time I knew it, that he had not, in fact, discontinued the practice that he had previously promised me he would do. Both he and Mr. Cox, his predecessor, told me that the reason they tipped the Associated Press off to International News Service stories was that the stories so tipped, were credited to their record and counted in their advancement by The Associated Press.

In every instance where either Cox or Muggeridge sent out a tip to The Associated Press offices that the International News Service was carrying a certain story, Cox or Muggeridge would receive in a

short time thereafter, from the central office of The Associated Press, a story basically identical with the International
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News Service story which had previously been tipped off to them. Upon receiving such story, they would at once typewrite it and deliver it to the editor of the Call & Post, as a part of the regular Associated Press press report. These stories, of course, would bear no indication that they had originated with the International News Service, and no credit would be given to the International News Service.

A "tip," in news service parlance, means a despatch containing, in a brief manner, the substance of the nature and character of a story and is frequently accompanied by an indication as to its point of origin.

In some of the instances referred to in this affidavit, the matter sent out by Cox and Muggeridge to The Associated Press, was more than a tip, as defined above, and was such an extended report of the matter that the Associated Press could write the story and send it out over their wires from the tip itself, and without making any independent inquiry or ascertaining any additional facts.

KENT R. COCHRAN.

Sworn to before me this 13th day of January, 1917.

JOHN T. STURDEVANT,

Notary Public, New York Co.

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Affidavit of Victor H. Loomis.

United States District Court, Southern District of New York.

THE ASSOCIATED PRESS, Complainant,

against

INTERNATIONAL NEWS SERVICE, Defendant.

STATE OF NEW YORK.

County of New York, ss:

Victor H. Loomis, being duly sworn, deposes and says:

I reside at No. 5 East Eighth Street, New York City.

In the month of May, 1915, I was employed as a telegrapher by the International News Service and as such was stationed, during the time hereinafter mentioned, in the Supreme Court House in the City of Syracuse, State of New York, in order to report from one of the Court rooms in said Court House the trial of the libel suit brought by William Barnes against Theodore Roosevelt, which was then being tried before the Supreme Court in said Court room.

The International News Service had a direct wire into an anteroom adjoining said Court room. My telegraph instruments, by which I could send and receive messages, were on a table in this anteroom. I was using both a silent and a loud sounder.

The loud sounder is a part of the ordinary telegraph outfit, and its clicks can be heard by any one of ordinary hearing. The silent sounder is attached by wire to the instrument, and is intended to be held in contact with the ear. It acts as does a telephone receiver, and cannot be heard when held to the ear by any one except the person receiving the message.

265 The reason I used the loud sounder was because I am slightly deaf, and it is very difficult for me to hear a silent sounder at times.

The Associated Press also had a direct wire into said anteroom, from which one E. F. Wilson, an employe of The Associated Press, was reporting said trial. He, like myself, had his telegraph instruments on a table. Mr. Wilson was using nothing but a silent sounder. Mr. Wilson's instrument was approximately and not more

than ten feet from my instrument. A telegraph instrument in operation with a loud sounder can easily be heard by a person of average hearing at a greater distance than ten feet.

While the trial was in progress, and on May — 1915, a bulletin came over the International News Service wire, at a time when the instrument was connected with the loud sounder, stating in effect that the Cunard liner Lusitania had been torpedoed and giving some of the details of that catastrophe obtainable at that time. I am informed that the bulletin aforesaid had been preceded by a flash briefly outlining the fact that the Lusitania had been torpedoed, but at the time this flash was received, which was shortly before the bulletin was received, I was not in the room, to the best of my recollection, although my instrument was then connected with the loud sounder. The clicking of my instrument, connected as it was with the loud sounder, could readily be heard at the table on which The Associated Press instrument was located.

Shortly thereafter, I was informed by Mr. W. G. Warnock, who was also a telegraph operator employed by the International News Service and who was employed on the day wire of that service in an office in the Herald Building in Syracuse, N. Y., that Mr. Wilson, the operator of The Associated Press, had said to him, Warnock, in substance and effect, that it was possible to get the news from the opposition wire, meaning by "opposition" the International News Service wire. This conversation with Mr.

Warnock, which I have just detailed, arose in connection with Mr. Warnock's statement to me that Wilson had said to him that it was possible for anyone who had been in the anteroom where the instruments were located to take the International News Service material as it came over the wire, because of the loud sounder.

Sworn and subscribed to before me, this 12th day of January, 1917.

Notary Public, New York County.

Affidavit of Carlyle E. Cox.

United States District Court, Southern District of New York.

THE ASSOCIATED PRESS, Complainant,

against

INTERNATIONAL NEWS SERVICE, Defendant.

STATE OF NEW YORK,

County of New York, ss:

Carlyle E. Cox, being duly sworn, deposes and says:

I reside at the Metropole Hotel, St. Louis, Mo. I am at present employed by the International News Service as a telegraph operator

in the City of St. Louis, with offices at No. 902 Star Building. My duties are to receive from the International News Service its day news report, make copies of the same, and to deliver the same as received to the telegraph editor of the St. Louis Star, a newspaper which receives the International News Service report.

I have been in the employment of the International News Service since about October, 1914.

In the spring of 1914, I was employed by The Associated Press as a telegraph operator, and my office was in the editorial rooms of the San Francisco Call and Post at San Francisco, Cal. I was employed at this time as a telegraph operator, and my duties were to receive over the wire the news report of The Associated Press, to make a typewritten copy thereof, and deliver the same to the telegraph editor of the San Francisco Call and Post.

That paper at this time also received the news service emanating from the International News Service, and such service came in over the telegraph wire and was received by Kent R. Cochran, a telegraph operator then in the employ of the Western Union Telegraph Company, that being the company over whose wires the telegraph messages came, and Mr. Cochran, after receiving such news report, typewrote the same and delivered it, as I did my report, to the telegraph operator of the San Francisco Call and Post.

Mr. Cochran's desk, at which he received his despatches, was located within a few feet of mine, and I could hear his instrument working, and he could hear mine. Likewise, I could read his messages, and he could read mine.

The wire over which I received The Associated Press despatches was a direct trunk wire between the office of The Associated Press in Chicago and San Francisco and ran through and served newspapers in the Cities of Des Moines, Iowa, Omaha, Neb., Denver, Colo., Salt Lake City, Utah, and Reno, Nev.

I remember on one occasion that Mr. Cochran received over his wire a despatch emanating from the International News Service or its correspondents, which related to the death of one Weyerhauser, who was popularly referred to on the Pacific coast as the "Lumber King," and a man reputed to be worth many millions of dollars. The despatch which Mr. Cochran received stated in substance, as nearly as I can recall it, that the said Weyerhauser had died at some point near Los Angeles. This story was of unusual interest to newspapers throughout the country, and particularly to newspapers in the vicinity of St. Paul and Minneapolis, where the said Weyerhauser lived. It was also of interest to financial circles throughout the country.

As soon as this story came in over the wire to Mr. Cochran, he turned to me and asked me if I had received any story about the death of Weyerhauser from the Associated Press, and said that he had just received it. I told him that I had not yet received any such story, and as soon as Mr. Cochran had finished writing out the despatch and had gone into the other room to take it to the telegraph editor, I at once messaged the San Francisco Bureau of

The Associated Press that Weyerhauser was dead, and they, of course, understood from what source I had obtained this information, as it was the only source open to me, to wit, International News Service despatches. Within a couple of minutes thereafter, The Associated Press sent a flash that Weyerhauser was dead, and a few minutes after that, sent a bulletin emanating from Los Angeles, briefly stating the circumstances of his death. Los Angeles was not on my wire, and evidently upon receipt of my tip, the San Francisco bureau messaged the Los Angeles bureau, which thereupon got the story. The bulletins which were transmitted to me came directly from the San Francisco office and not from the Los Angeles office, which my instrument had no connection with.

269 A short time prior to the event which I have just mentioned, I saw a notice or bulletin on the bulletin board of the San Francisco bureau of The Associated Press, stating, in substance, that the orders of Mr. Stone, the general manager of The Associated Press, were that any time that a news story of any importance broke and came to the attention of the operators and employes of The Associated Press, and when it appeared to them that the news department of the Associated Press was not getting the story on the wires quickly, that they should promptly tip off the news department of The Associated Press at the nearest bureau office, so that the story could be promptly handled by The Associated Press. This bulletin, to which I have above referred, further stated that any tips so sent out would be credited to the operator sending the same, and would count in his advancement.

I assumed that in promptly sending out the tip of the Weyerhauser story above referred to, that this enterprise on my part would be credited to my record. Whether it actually was or not, I do not know. In the spring of 1914, I resigned as an employe of The Associated Press, as my nerves had gone to pieces from overwork, and I wanted to rest.

At various times during the last ten or twelve years, I have worked for The Associated Press, and I have times without number known of messages going over the wires of The Associated Press between one bureau and another, and between the head office and some local bureau of The Associated Press, to the effect that opposition news services were carrying a certain story, which meant that the bureau notified should promptly get the story on the wire, so that The Associated Press could serve its own members and subscribers.

CARLYLE E. COX.

Sworn and subscribed to before me, this 16th day of January, 1917.

JOHN T. STURDEVANT,
Notary Public, New York County.

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GROUP No. 4.

Affidavit of Edward R. Sartwell.

United States District Court, Southern District of New York.

THE ASSOCIATED PRESS, Complainant,

against

INTERNATIONAL NEWS SERVICE, Defendant.

STATE AND COUNTY OF NEW YORK, ss:

Edward R. Sartwell, being duly sworn, deposes and says:

I reside at No. 1904 Second Street, N. E., Washington, D. C., and I am at present in the employment of the International News Service and have been so employed since December, 1915. During the time I have been in the employment of the International News Service, I have been a reporter and editor, attached to the Washington Bureau.

From January, 1910, to May, 1912, I was employed by the United Press Association, as reporter and editor at the Bureaus of that Association located in the Cities of New York, Chicago and Washington.

From May, 1912, until December, 1915, I was employed by the Associated Press, as an editor and reporter in its Washington office. During the time aforesaid that I was connected with, and employed by the United Press Association and The Associated Press, it was a

custom of both to make such use as they could of matters of news, and information, carried by other news services, including the International News Service. Both editors of the United Press and The Associated Press were either expressly instructed (or, without such express instructions, understood that their duty was) to carefully watch for any matters of news carried by other press associations which were not carried by the association in question, and, upon the appearance of such matter, to at once message the headquarters office of the association, or the bureau or correspondent in whose territory the story originated, the nature of such opposition story, so as to tip off the fact that such a story existed and to enable them to get it. Very frequently, these tips sent out were sufficiently complete as to the nature and character of the story and its point of origin to enable the central office of the association to whom the tip was sent to re-write the information, and then send it out over its own wires to its own customers, as its own bulletin, without making an independent investigation.

On receipt of such tips, the central office of the organization to whom they were addressed did, very frequently, send out the story to which it had been tipped off, very promptly, in order to get to its subscribers the story for publication.

While I was in the employment of the United Press Association, its employees used code words to designate the opposition services which were carrying matter which the United Press did not have.

For instance, the code word "Appleton's" was used to designate an Associated Press despatch, and the word "Henderson's" was used to designate a despatch which had originated with the Hearst news service and subsequently with the National News Association, which later was merged with the International News Service into the corporation which is the defendant in this action. These words prefaced the despatch which was sent by the employees of the

272 United Press to the central office, in order to indicate to the central office what organization was carrying the story which it was desired to obtain.

After I left the United Press and went with The Associated Press, in notifying the central office of any stories carried by the International News Service which the Associated Press did not have, we would message the head office of The Associated Press and generally preface the message with the words "Opposition says," and then follow with the message itself. Invariably, after such a message was sent out, The Associated Press would come back with a bulletin or story, covering the event as to which they had been tipped off and, in many instances, the tip which was sent them was sufficiently complete in character to enable them to write a bulletin from it and send it out without making any independent investigation as to the story itself.

While I was in the Washington Bureau of The Associated Press it was the custom of the employees of that bureau to obtain, as soon as they were printed, the various newspapers published and circulated in the City of Washington, among others, the Washington Herald, a newspaper which at that time was a subscriber to the news service of the International News Service, or its predecessor, the National News Association; and the Washington Times, which was a subscriber to the news service of the United Press.

Both these papers were carefully read by the staff and such items of news taken therefrom, although not originating with the Associated Press, and were re-written, and sent out to the members of The Associated Press, whenever the stories were of sufficient importance, in the judgment of the employees of the Washington Bureau of The Associated Press, to warrant their being sent out.

During the entire time I was in the Washington Bureau of The Associated Press, messages were constantly going and coming

273 over the trunk wires which ran through the Washington office from various Associated Press Bureaus and correspondents in various States of the United States to the Central Office, at New York, and vice versa, notifying the central office that "Opposition" was carrying such and such a story and thereafter bulletins and matters of news would come back from the Central Office, directed to the various bureaus of The Associated Press, containing the story, or a bulletin thereof, as to which the Central Office had been tipped off in this manner.

EDWARD R. SARTWELL.

Sworn to before me this 15 day of January, 1917.

JOHN T. STURDEVANT,

Notary Public, New York Co.

274 *Affidavit of William M. Baskervill.*

United States District Court, Southern District of New York.

THE ASSOCIATED PRESS, Complainant,

against

INTERNATIONAL NEWS SERVICE, Defendant.

STATE AND COUNTY OF NEW YORK, ss:

William M. Baskervill, being duly sworn, deposes and says:

I reside at No. 114 West 94th Street, Borough of Manhattan, City of New York, and I am at present employed on the New York Evening Journal in the capacity of Assistant City Editor, and have been so employed since *on* or about December, 1915.

Commencing on or about May 11, 1911, and extending to December, 1914, I was employed by The Associated Press in the following capacities:

From entering the service, I was employed in the Atlanta office under Superintendent Paul Cooles, as Night Pony Editor; about six months later, I became Assistant Night Manager, and a little later, Night Manager of the Atlanta office of The Associated Press, under Superintendent Robert T. Small, and still later, I became News Editor of the entire Southern Division of The Associated Press, with headquarters in Atlanta. The latter position I occupied for nearly a year.

My duties, as Assistant Night Editor, and subsequently as Night Editor, as above outlined, were to see that the employees of
275 that office properly and promptly sent out to the Associated Press members the news delivered to the Atlanta office, and also to see that news originating in Atlanta and vicinity and in my district, was sent out to the trunk lines of The Associated Press, which took the news throughout the country. In this capacity I, of course, saw all of the incoming and outgoing reports and matters of news.

After I became news editor of the Southern Division, I had direct supervision under Superintendent Small of all the news in the Southern Division, this division, roughly, being bounded on the south by Florida and Texas and on the north by Washington, D. C., and Oklahoma. In this latter capacity, I also saw and had delivered to me matters of news coming in and going out of said district, and I became thoroughly familiar with the course and practice of the Associated Press in both the procurement and distribution of its news.

During the entire period of time, as aforesaid, that I was employed by, and connected with, The Associated Press, the complainant frequently sent out from its Atlanta office stories and items of news which had appeared in the Atlanta Georgian, a newspaper which at that time did not take any Associated Press service. For

instance, in the case of an important item of news occurring somewhere in the Southern Division, above mentioned, which was reported in the Atlanta Georgian ahead of the other Atlanta papers, or ahead of the Associated Press correspondents, we would take that story and rewrite it and sent it out on the Associated Press leased wire to the various parts of the country and to our members in the Southern territory. This was a common and invariable practice unless there was some obvious reason for doubting the authenticity of the story.

In the case, however, of an item of news of unusual importance appearing in the Atlanta Georgian, or in any other Southern
276 paper, other than an Associated Press paper, and which originated outside of such Southern territory, or abroad, we would immediately, as soon as we learned of the existence of said article, transmit by telegraph, to the main office of The Associated Press in New York, a tip, giving the point of origin and the nature of the story, and would indicate the news service which had sent out the story, in the manner following:

During the early part of my service with the Associated Press, we used the word "opposition" to indicate any news service other than that of The Associated Press, for instance, if an item of news appeared in a paper, other than a paper of a member of The Associated Press, which item had not been received in Atlanta on the wires of the Associated Press, we would at once message the main office in New York that the "opposition" was carrying the story, describing it briefly. Later on, The Associated Press adopted a code system and as a part thereof, adopted a code word for "Hearst" which was to be used in indicating to The Associated Press, in New York, that the International News Service, or some Hearst newspaper, was carrying a particular story which The Associated Press did not have, or which our bureau had not, to that time, received from The Associated Press. The practice above described was in constant operation during the time that I was connected with The Associated Press, and is a common and well recognized newspaper and news service practice.

During all of the time aforesaid, when I was connected with The Associated Press, it likewise frequently happened that messages would come to the main office, as well as the headquarters of the Central Division, at Chicago, and the Western Division, at San

Francisco, notifying our bureau that the "opposition" news
277 services and the International News Service were carrying stories originating in my territory, and, in that connection, would, when referring to the Hearst papers, or the International News Service, use the code word to which I have above referred. On receipt of such messages, I would, as soon as I could, obtain the story referred to in the tip sent to me, and as soon as obtained, sent it out to the Associated Press members. It has always been the practice, and it is part of the duties of a local or district bureau manager, to promptly advise his headquarters whenever an opposition service is carrying a story which is of unusual interest and which the

bureau office has not yet received. This is to prevent, if possible, one news service from being beaten too badly by another.

It has been, to my knowledge, the universal custom among newspaper men, and among news services, to utilize the facts which are set forth in any published story, to rewrite that story, if they see fit, and to send it out to whom, and as they see fit.

The source of any items rewritten from opposition papers was absolutely ignored, that is to say, if an article should appear in the Atlanta Georgian, accompanied by a notice that it had been received through the International News Service, no reference to that fact would be made in the story, as subsequently rewritten and sent out by the Associated Press to its members.

During the period commencing in or about the early part of the summer of 1914, and ending in the late summer of 1914, I acted as Bureau Manager of the Louisville, Ky., office of The Associated Press, as well as News Editor of the Southern Division. During this period, I had my headquarters in Louisville, Ky. The Louisville, Ky., bureau office was, at that time, on the main trunk line of The Associated Press, running from New York and Washington to Chicago. All messages and items of news between those 278 points went over that wire and were copied in my office in accordance with the general order of the General Manager of The Associated Press, Mr. Melville E. Stone. During this time, I saw and read some messages which came over that wire and which originated either at the western or the eastern end, to the effect that opposition news services, or the International News Service, were carrying certain stories. These messages would never mention the International News Service by that name. The code word to which I have above referred was always used to indicate the International News Service as the source of the story to which the message referred. After this time, I went to Washington, D. C., as News Editor of the Southern Division, and, in that connection, also to make arrangements to start anew in the wire division. This involved a re-routing of the wires in the Southern Division, which was under my jurisdiction, as described above. While I was at Washington, occasionally code messages of the character above described came over the trunk line into Washington, in the same manner, which messages I read.

As I said before, I left the Associated Press service in December, 1914, having been granted an indefinite leave of absence, so that I could go to Europe, with the understanding that I should take my own chance of an opening when I returned. I came back about the first day of April, 1915, and went with the Evening Journal a few days thereafter.

W. M. BASKERVILL.

Sworn to before me this 12 day of January, 1917.

JOHN T. STURDEVANT,

Notary Public, N. Y. Co.

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Affidavit of William Schwinger.

United States District Court, Southern District of New York.

THE ASSOCIATED PRESS, Complainant,

against

INTERNATIONAL NEWS SERVICE, Defendant.

STATE OF NEW YORK,

County of New York, ss:

William Schwinger, being duly sworn, deposes and says:

I reside in Chicago, Ill., and am temporarily sojourning at the Broadway Central Hotel, New York City. I am employed by Thomson & McKinnon, stock brokers, Chicago.

I was employed by the Associated Press, as a telegrapher in the Chicago office of the Associated Press, located in the Western Union Telegraph Building, in Chicago, commencing in the latter part of August, 1916, and ending the latter part of September, 1916.

During the time that I was employed by the Associated Press, my duties were transmitting and receiving news over a telegraph circuit, which was a trunk wire between Chicago, Milwaukee, St. Paul and Minneapolis. The news copy which I sent out was delivered to me by the office boy and the messages which I received I would make mimeographic copies of on the typewriter, and deliver them to the office boy, who in turn would deliver them to the
280 editor in charge, Mr. Herbert Spencer, who was my superior officer.

During the time I was so employed, which was about a month, on several occasions I sent out, in the regular course of my duties, articles of news which had previously been published by the Chicago Examiner and the Chicago Herald, and which had been rewritten by H. L. Remick, an editor of the Associated Press. These articles so written and sent out by me were sent out to members of the Associated Press on my wire, namely: newspapers in Minneapolis, St. Paul and elsewhere.

The Chicago Examiner is not a member of the Associated Press, nor does it receive its news service.

The articles of news to which I have referred and which I sent out, were items of news which the Associated Press had not received from its correspondents, to the best of my belief. There is one incident which I remember particularly. On this occasion I received for transmission a story which had been rewritten from articles published both in the Herald and the Examiner. The copy which came to me contained a notation that it had been rewritten from the articles appearing in both newspapers, had been approved by the editor in chief and subsequently by the wire editor. This story combined in one article the important features of the Herald

story and the important features of the Examiner story, and went out in that form to the clients of the Associated Press, on my wire, and went out as an Associated Press news despatch, without any indication as to its origin.

WILLIAM SCHWINGER.

Sworn to before me this 12th day of January, 1917.

JOHN T. STURDEVANT,

Notary Public, N. Y. Co.

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Affidavit of Fred Harvey.

United States District Court, Southern District of New York.

THE ASSOCIATED PRESS, Complainant,
against

INTERNATIONAL NEWS SERVICE, Defendant.

STATE AND COUNTY OF NEW YORK, ss:

Fred Harvey, being duly sworn, deposes and says:

I reside at 427 St. Johns Place, Borough of Brooklyn, New York City. I am at present employed as a re-write man on the staff of the N. Y. Evening Journal, and have been so employed, in that capacity, continuously for the two months last past.

I was employed, about six years and eight months ago, in the New York offices of The Associated Press.

I was first employed by The Associated Press in the capacity of a re-write man and subsequently was put in charge of a wire service which was known as the "Early Morning Up-State Wire."

When I was in charge of the Up-State wire of The Associated Press, I frequently took stories which had appeared in the New York Morning Sun, revised or re-wrote fifty or a hundred words of the first part of the story, commonly called the "lead" and pasted up the rest of the story to the revised "lead," and then transmitted the same on the wire to the up-state (New York) clients and customers of The Associated Press.

282 The stories which I obtained and transmitted, as stated, were substantially the stories which I took from the Sun, excepting for a change in the "lead," as described above.

The stories which I obtained and transmitted, as stated above, were frequently exclusive stories of the New York Sun, being stories furnished to the New York Sun by a service known as the "Laffan Bureau," which was controlled by The New York Sun.

I frequently took these exclusive stories, very often consisting of special cables to the Laffan Bureau, revised them, as stated above, and transmitted them as Associated Press matter to the clients and customers of that association.

These stories were transmitted over the special wires of The Associated Press.

The original "copy" of the stories so transmitted was sent, as a matter of routine office regulation, to the Superintendent of the local office of The Associated Press.

The matter described above was sent out by me continuously, "copy" of it being sent to the local Superintendent of the Associated Press, with the knowledge of the local Superintendent, and I never received any order or direction to discontinue this practice.

The Superintendent in charge of the local office of The Associated Press, at the time of the transmissions set forth above, was one Thompson, whose first name I do not now remember.

FRED HARVEY.

Sworn to before me this 12th day of January, 1917.

J. A. BRASHEARS,
Notary Public, N. Y. Co.

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Affidavit of John M. Fletcher.

United States District Court, Southern District of New York.

THE ASSOCIATED PRESS, Complainant,
against

INTERNATIONAL NEWS SERVICE, Defendant.

STATE OF NEW YORK,
County of New York, ss:

John M. Fletcher, being duly sworn, deposes and says:

I reside at No. 20 Morningside Avenue, New York City. I am a telegrapher employed by the International News Service, and have been employed in that capacity since February, 1916.

In the latter part of 1914 and the early part of 1915, I was employed as utility man by The Associated Press, with offices in the Healey Building, at Atlanta, Ga., and was subject to the direction and control of C. J. King, Division Traffic Chief, Atlanta, Ga.

I have frequently seen editors of The Associated Press employed in said office rewriting from copies of the Atlanta Georgian items of news therein contained, and using the contents thereof for their pony service. The matter so rewritten was thereafter sent out by The Associated Press to their members and subscribers as Associated Press news despatches, and some of such matter was

284 matter received by the Atlanta Georgian from the International News Service.

JOHN M. FLETCHER.

Sworn and subscribed to before me, this 13 day of January, 1917.

G. BACHTELER,
Notary Public, New York County.

Affidavit of Homer V. Hogan.

United States District Court, Southern District of New York.

THE ASSOCIATED PRESS, Complainant,

against

INTERNATIONAL NEWS SERVICE, Defendant.

STATE OF ILLINOIS,

County of Cook, ss:

Homer V. Hogan, being first duly sworn on oath deposes and says that for several years prior to December, 1912, this affiant was employed in various capacities by the office of the Associated Press, located in the City of Chicago, County of Cook and State of Illinois; that such office while located in said City, treated as local news all items of interest arising in suburbs, towns and smaller municipalities within a radius of approximately sixty to one hundred miles from the City of Chicago; that during a part of the
285 time that this affiant was employed as aforesaid, this affiant was employed upon the local desk, so-called, and also was in charge during the night at various times of the north wire and the pony wire, etc.

This affiant further states that while he was on the local desk, it was a part of this affiant's duty, and he did obtain copies of all of the papers published in the afternoon or during the day time in the City of Chicago, County of Cook and State of Illinois; that among such papers was one called the Chicago American which was commonly known and designated as a Hearst paper, and was for a part of the time known as Hearst's Chicago American.

This affiant further states that the said Chicago American or Hearst's Chicago American was not during the time that this affiant was so employed by the Associated Press a member of such Associated Press, did not receive its news therefrom, nor voluntarily furnish the Associated Press with news which it obtained; that this affiant in the course of the duties on the local desk, had an office in the building of the Chicago Daily News, and from such Chicago Daily News this affiant obtained proofs of the issues to be published by the said Chicago Daily News and obtained from the Chicago Daily Journal, another daily newspaper, proofs of its issues, and from the Chicago Evening Post, another Chicago daily newspaper, proofs of its issues, all of which said papers were members of the Associated Press; that in addition thereto it was a part of this affiant's duty and he did examine and read all of the newspapers published in the City of Chicago including the Chicago American as aforesaid, for the purpose of discovering any item of news interest to other localities than the City of Chicago which were published

in such paper; that it was a part of this affiant's duty and
 286 he did, where he found an item of news interest emanating
 apparently from some town of city other than the City of
 Chicago, call the attention of the local office of the Associated Press
 to such item so that such office could transmit the facts in regard
 thereto to the papers served by the said Associated Press.

This affiant further states that it was a part of his duty and he did,
 when he found in the said Chicago American any item of news inter-
 est not carried or appearing in any other newspaper in the City of
 Chicago to take the same and rewrite it, and where it would be of
 sufficient interest to the world at large or any particular locality of
 the United States, to give the same to the Day Manager for trans-
 mission over the wire under the Chicago date line; that this affiant
 treated items of news interest appearing in the Chicago American
 in identically the same fashion as he treated items of interest appear-
 ing in the Chicago Journal, Chicago Evening Post and Chicago Daily
 News, which were members of the said Association.

This affiant further states that this practice continues so long as
 this affiant was connected with the Associated Press and had knowl-
 edge thereof.

HOMER V. HOGAN.

Subscribed and sworn to before me this 12th day of January,
 A. D. 1917.

[SEAL.]

A. STANDERWICK,

Notary Public.

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Affidavit of Lloyd E. Thrush.

United States District Court, Southern District of New York.

THE ASSOCIATED PRESS, Complainant,

against

INTERNATIONAL NEWS SERVICE, Defendant.

STATE OF ILLINOIS,

County of Cook, ss:

Lloyd E. Thrush, being first duly sworn on oath deposes and says
 that he has been employed for some time by the Associated Press and
 that in the interval between approximately the 15th day of March,
 A. D., 1916, and the 4th day of November, A. D. 1916, he was em-
 ployed in the office maintained by such Association in the City of
 Chicago, County of Cook and State of Illinois.

Affiant further says that while he was in such office in Chicago
 this affiant filled various positions and places, and had assigned to
 him various duties; that he was at different time- "outside man,"
 "Day City Editor," "Night City Editor," "Telegraph Editor" for
 western wires and other wires centering in such office.

This affiant further says that while he was the Day City Editor of such office in the City of Chicago, it was a part of his duty to secure all of the afternoon papers published in said City of Chicago, and examine the same for items of news interest.

Affiant further states that among such papers was the paper called the Chicago American, which was published daily, every afternoon except Sunday, in the City of Chicago, and which was commonly known and designated as a Hearst newspaper; that the said
288 Chicago American was not a member of the Associated Press and did not receive its news therefrom, but was supplied with news by the International News Service, and ran and contained paragraphs and articles under the name and heading of International News Service.

This affiant further states that he, as a part of his duty, examined all of the afternoon papers published in the City of Chicago, including the Chicago American, and if this affiant found therein items which he believed would be of news or interest to other parts of the country, he re-wrote the same and made manifolds thereof for distribution to the different telegraph operators in the same office; that this affiant, as a part of his duty, obtained this news from the said Chicago American whenever the said Chicago American contained any item of news interest to other parts of the country served by the Associated Press, and treated such items of news in exactly the same fashion as he did items of news in other publications published in the City of Chicago in the afternoon which were members of the Associated Press.

This affiant further states that during the time that this affiant was Night City Editor, it was a part of this affiant's duty to read all of the papers published in the morning, or circulated in the morning in the City of Chicago which said papers were received by this affiant and were actually printed by the publishers thereof prior to one o'clock in the morning of the day of the apparent date of that issue; that among such papers was a paper called the Chicago Examiner, commonly known as a Hearst publication, which was not a member of The Associated Press; that it was a part of this affiant's duty and he did take items which he believed to be of news interest to other parts of the country from such Chicago Examiner, among the other papers published in the City of Chicago and transmitted them to the
289 telegraph editors for sending to other parts of the country; that this was particularly the case where the Chicago Examiner had items not carried by other Chicago newspapers or features and stories not carried by other Chicago newspapers.

This affiant further states that during the time of his service in the said Chicago office, this affiant on various times and occasions occupied and filled the position of early morning City Editor; that as a part of the duties of such early morning City Editor, this affiant was instructed to and did examine and read all issues of the papers published or distributed in the City of Chicago in the morning which were actually printed and distributed after one o'clock a. m., on the day of the date of their issue, and which were not distributed as afternoon papers; that among such papers as the said Chicago

Examiner before mentioned, and that this affiant read and examined the said Chicago Examiner, among other publications, in the City of Chicago, and that this affiant did take, at various times, stories or items of interest from the said Chicago Examiner and distribute the same for transmission over the wire to other parts of the country served by the Associated Press as items emanating from the Associated Press in the regular report of the Associated Press.

This affiant further states that in speaking of the City of Chicago, this affiant means the City of Chicago and the locality within a radius of approximately sixty (60) miles thereof which is designated as local to the Chicago office of the Associated Press.

Further affiant sayeth not.

LLOYD E. THRUSH.

Subscribed and sworn to before me this 13th day of January, A. D., 1917.

HARRY E. ACKERBURG, JR.,
Notary Public.

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Supplemental Affidavits.

Affidavit of Bradford Merrill.

United States District Court, Southern District of New York.

THE ASSOCIATED PRESS, Complainant,

against

INTERNATIONAL NEWS SERVICE, Defendant.

STATE OF NEW YORK,

County of New York, ss:

Bradford Merrill being duly sworn, deposes and says:

I have read the bill of complaint herein. The second paragraph of Clause 6 of said Bill states that:

"An essential part of the plan of operation of the complainant accordingly is that news collected by it shall remain confidential and secret until its publication has been fully accomplished by all of complainant's members, because otherwise competing newspapers which bear no part of the cost would unfairly and inequitably receive the benefit of the service."

I am a member of the Associated Press, the complainant above named, as representing the New York American, a daily newspaper published in the City of New York. I am familiar with the Charter and By-laws of The Associated Press and I annex a copy thereof to this affidavit.

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There are no provisions in the Charter of the Associated Press which provide that news collected by it shall remain confidential and secret until its publication by all of complainant's members, as the Court will see by inspecting said Charter.

The only provisions of the By-laws applicable to the protection of news furnished by The Associated Press, are as follows:

Article VII.

"Sec. 4. The news service of this Corporation shall be furnished only to members thereof, or to the newspapers represented by them and specified in their certificates of membership.

"Sec. 5. A member shall publish the news of The Associated Press only in the newspaper, the language and the place specified in his certificate of membership and he shall not permit any other use to be made of the news furnished by the Corporation to him or to the newspaper which he represents.

"Sec. 6. The time limits for the receipt and publication of news by members shall be (standard time in all cases at the place of publication) as follows: Morning papers to receive not later than 9 a. m. and to publish not earlier than 9 p. m., except that for editions to be circulated only outside of the city of publication not earlier than the following morning, morning papers may publish not earlier than 5 p. m. and that Sunday editions so published may be circulated in the city of publication after 9 p. m. Saturday; afternoon papers to receive not later than 6 p. m. and to publish not earlier than 9 a. m. The service to afternoon papers between 4 p. m. and 6 p. m. to be of bulletin character; provided, that the Board of

Directors may authorize that upon extraordinary occasions
292 The Associated Press dispatches may be used in extra editions or for bulletins outside of the hours named.

"Sec. 8. No news furnished to the Corporation by a member shall be supplied by the Corporation to any other member publishing a newspaper within the district which the Board of Directors shall have described in defining the obligations of such member to furnish news to the Corporation.

Article VIII.

"Sec. 6. No member shall furnish, or permit any one in his employ or connected with the newspaper specified in his certificate of membership to furnish, to any person who is not a member, the news of the Corporation in advance of publication, or to another member any news received from the Corporation which the Corporation is itself debarred from furnishing to such member, nor conduct his business in such a manner that the news furnished by the Corporation may be communicated to any person, firm, corporation, or association not entitled to receive the same.

"Sec. 7. No member shall furnish, or permit any one to furnish, to any one not a member of this Corporation, the news which he is required by the By-Laws to supply to this Corporation."

On April 21, 1913, (see page 52 of the Charter and By-laws of the Associated Press, hereto annexed), the Board of Directors of the Associated Press adopted a resolution that the public display of news

293 upon bulletin boards at the main or branch offices of a newspaper in its own territory, does not constitute a violation of the By-laws which provide that no member shall furnish the news of The Associated Press in advance of publication, to any person who is not a member of The Associated Press.

It will, therefore, be seen that there is no provision that news gathered by the Associated Press shall remain confidential and secret until its publication has been fully accomplished by all of complainant's members.

Moreover, such a plan of operation would not be practical and has never been put in operation, and could not be put in operation so far as I am aware; and this, if for no other reason, because of the fact that The Associated Press delivers its news service to newspapers throughout the United States, both on the Atlantic Coast and on the Pacific Coast. In the instance of a New York morning newspaper going to press, as most of them do between the hours of 11 p. m. and 2 a. m., the paper itself would be printed, distributed and sold on the streets of this city long before a morning newspaper goes to press in San Francisco. The news is, therefore, published in the eastern part of this country several hours earlier than it is in the western part. There is no simultaneous publication of morning newspapers throughout the United States, and, for that reason, it is impossible that news emanating from Associated Press sources and published in newspapers should be published at the same time. Obviously, any competing newspaper or news service can acquire its information as to the news as soon as the first paper served by the Associated Press is published.

BRADFORD MERRILL.

Sworn to before me this 17th day of January, 1917.

T. E. McENTEGART,
Notary Public, N. Y. Co.

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Affidavit of Fred J. Wilson.

United States District Court, Southern District of New York.

THE ASSOCIATED PRESS, Complainant,
against

INTERNATIONAL NEWS SERVICE, Defendant.

STATE OF NEW YORK,

County of New York, ss:

Fred J. Wilson, being duly sworn, deposes and says:

I am the General Manager of the International News Service.

I am informed that The Associated Press claims that its news is furnished to its members, including the Cleveland News, under a stipulation or agreement between The Associated Press on the one

hand, and the member receiving its news on the other, that such news shall be used by the receiving member only for the purposes of publication, and shall not be disclosed to others, such, for instance, as the International News Service.

The International News Service was and now is under exactly the same arrangement with the Cleveland Company, which is the owner of the Cleveland News.

The Cleveland News has been receiving the news report of the International News Service ever since January 1st, 1914, pursuant to contract in writing between the Cleveland Company and the International News Service. This contract provides, among other things, that the International News Service will furnish and deliver to the Cleveland Company a "full day leased wire news service, operator to be paid by the party of the first part (International News Service) * * * for publication by the party of the second part (the Cleveland Company) in the *Cleveland Leader* and *Cleveland News*, and for no other use or purpose" (italics ours), until November 29th, 1919. It will be seen, therefore, that the Cleveland Company and its agents, servants and employees, one of whom was the said B. E. Cushing, were bound not to disclose information received from the International News Service to others prior to the actual publication of that news in the newspaper of the contracting corporation, the Cleveland Company.

As I stated in an earlier affidavit made by me in this action, the International News Service is now furnishing approximately four hundred papers scattered throughout the United States with news and feature service. Each paper so served by the International News Service is served pursuant to written contract between such paper and the International News Service, and every one of said contracts provides, as does the contract of the Cleveland Company, that the news and material furnished by the International News Service is furnished only for publication in the newspaper specified and for no other use and purpose, and each one of our subscribers has agreed thereby not to deliver information of our service to any other person, prior to its publication in their newspapers.

FRED J. WILSON.

Sworn and subscribed to before me, this 18th day of January, 1917.

JOHN T. STURDEVANT,
Notary Public, New York County.

296 *Opinion of United States District Court.*

United States District Court, Southern District of New York.

THE ASSOCIATED PRESS, Complainant,
against

INTERNATIONAL NEWS SERVICE, Defendant.

Stetson, Jennings & Russell, Solicitors for Complainant. (Fred-
erie B. Jennings and Winfred T. Denison, Counsel.)

William A. de Ford, Solicitor for Defendant. (Samuel Untermyer, Henry A. Wise, Irwin Untermyer, William A. de Ford, Claude A. Thompson and John T. Sturdevant, Counsel.)

AUGUSTUS N. HAND, *District Judge*:

This is a motion for an injunction pendente lite to restrain the defendant from appropriating the news gathered by the complainant. Each party to the suit is engaged in the business of procuring news and supplying it to newspapers. The complainant is a membership corporation, and the defendant a stock corporation. The complainant during the year 1915 expended about \$3,500,000 in gathering news from all parts of the world for its members, which was assessed among them under the provisions of its By-laws, and

the defendant expended more than \$2,000,000 during the
297 same year in supplying news to its customers. It thus appears that the gathering and distributing of news requires a very large expenditure of labor and capital, and it is hardly necessary to say that no modern daily newspaper could afford to be without the facilities offered by a well-equipped news agency. The by-laws of The Associated Press provide that each member shall be entitled to receive a service of news for the purpose of publication in the newspaper specified in his certificate of membership and for that purpose only, and that a member shall publish the news of The Associated Press only in the newspaper, language and place specified in his certificate of membership and shall not permit any other use to be made of the news furnished by the corporation to him or to the newspaper which he represents; and that no member shall furnish or permit any one in his employ or connected with the newspaper specified in his certificate of membership to furnish to any person who is not a member news of The Associated Press in advance of publication. Each of the members is likewise required by the by-laws to gather and supply the local news of his district to The Associated Press, and to no one else. (Affidavit of W. P. Leech, verified January 19, filed on behalf of complainant.) Much the same arrangement as above outlined exists between the International News Service and the newspapers receiving its service. A considerable number of newspapers avail themselves of the news furnished by both of these agencies.

The value of the news accumulated by each of the parties to this suit depends upon its accuracy and upon its reaching the newspapers served before the news of any other competing news agency can be furnished. The bill of complaint states that:

“An essential part of the plan of operation of the com-
298 plainant accordingly is that news collected by it shall remain confidential and secret until its publication has been fully accomplished by all of complainant's members, because otherwise competing newspapers, which bear no part of the cost, would unfairly and inequitably receive the benefit of the service, and such a result would ultimately greatly impair the usefulness of the Association to its members and imperil its very existence.”

There is, to be sure, no requirement of the by-laws of The Associated Press that its members must publish news furnished by it at the same hour, and they necessarily do issue their publications at various times, but it is nevertheless true that Western papers, owing to the difference in time, can be furnished by a competing news agency with the news of The Associated Press published in the newspapers of its Eastern members, and gathered by it at great cost, with no expense of collection to the rival agency unless the sale of the news can be withheld for a sufficient time to prevent this. It is, therefore, undoubtedly a part of the successful operation of a countrywide news agency that rivals shall not be able to sell the news which its customers have published in the East to newspapers published several hours later in the West. In no other way can the results of its labor and enterprise receive any real protection within much of the territory it undertakes to serve. I comment upon this noticeable fact in passing without at this time discussing the legal features.

The complainant alleges that the defendant has wronged it and should be enjoined as to three matters:

(1) Arranging with employees of members of The Associated Press to furnish its news to the defendant for a consideration before publication;

299 (2) Inducing members to violate complainant's by-laws and permit defendant to obtain news of The Associated Press before publication;

(3) Copying news on bulletin boards and in early editions of complainant's members and selling this news to defendant's customers.

I will take up the foregoing charges seriatim. The moving papers established beyond a peradventure that the defendant employed, at \$5 per week, a B. E. Cushing, the telegraph editor of the Cleveland News, a paper holding a certificate of membership from The Associated Press, to furnish the defendant with local news gathered by the Cleveland paper. Indeed, the defendant not only admits that such is the fact but insists that such was the nature of the employment of Cushing and his only authorized service for defendant. Cushing not only furnished the defendant with local news of the Cleveland district, but also a substantial amount of other and particularly of foreign news which had come to the Cleveland paper over the wires of The Associated Press. The sinking of the hospital ship *Britannic* in the Aegean Sea; the decision by the United States District Court in Kansas that the Adamson law was unconstitutional; the fire on the steamer *Pohatan* off Block Island, the German raid on the East coast of England on November 26, 1916; the sinking of the Steamer *Chemung* in the Mediterranean; the declination of A. Bonar Law of the premiership and preliminaries to the appointment of Lloyd George; the explosion in the Quaker Oats plant in Canada; the fire in Toledo, Ohio; the illness of Lloyd George; the statement of Premier Briand as to the attitude of the Allies regarding German Peace Proposals, and the explosion and loss of life in mines of Tennessee Coal & Iron Company, were all

300 matters in respect to which some communications were made to the defendant by Cushing of news received from The Associated Press.

Barry Faris, the day manager of the defendant, on November 21, 1916, wrote F. R. Ward, the manager of the Cleveland office of the defendant, a letter of which the material portion is the following:

"DEAR MR. WARD: Agnew had an arrangement somewhere in the Cleveland office whereby he could tip us off on big news stories that the A. P. was carrying. I wish you would find out from him just what this connection was and if you cannot make use of it. It proves very valuable to receive a tip what the A. P. is carrying as soon as it puts it out on the wire. Don't mention the A. P. in any messages of that kind, but simply say 'Ansonia carrying fifty dead Pennsylvania wreck Pittsburgh,' or wherever it may be.

"BARRY FARRIS."

The foregoing letter from a responsible man in the employ of the defendant indicates a systematic attempt to secure news of the complainant and is the strongest corroboration of the latter's charges. It is not necessary to suppose that such a system was known to the officers of the defendant, or the proprietor of the Cleveland News, who deny that knowledge, but it is sufficient that the system existed and the acts were frequent and continuous. The only qualification of the facts I have recited which the defendant makes is the statement of Cushing in his affidavit submitted by defendant that he seldom volunteered tips of The Associated Press to the defendant, and that there were only two cases that he can definitely remember where such information originated with him. It can hardly be thought that Farris in his letter to Ward referred to

301 local Cleveland news when he spoke of "big stories that the A. P. was carrying." The only difference between local and foreign news is that the latter was more valuable to the defendant and the divulging of it more serious to the complainant, especially since the Allies have deprived the defendant of the right to use their cables and thus get news readily in the countries of Europe. It was equally illegal for the defendant to secure local news from the Cleveland newspaper since that involved a violation by the latter of its express contract with the complainant not to divulge this news to any one but The Associated Press except so far as it published it in its own papers. Agnew was the manager of the defendant in Cleveland, and makes oath to certain communications to the defendant in reference to the foregoing news of The Associated Press. Cushing himself deposes to his employment by the defendant without the knowledge of either the Cleveland News or The Associated Press of his relationship with the defendant. He also swears that he communicated to the defendant both foreign and domestic news belonging to The Associated Press.

There cannot be the slightest doubt that complainant's news was pirated at Cleveland and it is not really questioned. Cushing says

in his affidavit read on behalf of the defendant that "he seldom volunteered tips to the manager of the Cleveland office of the International News," but this is a weak qualification of the opposing affidavits, two of which he makes himself. He admits he was approached by the manager of the defendant's Chicago office and was employed to give it news. The intimate relation of the New York office of the defendant to this abstraction of complainant's news is evident from the following dispatches to the International News at Cleveland from Barry Paris:

"D. R. Anything on Chemung sunk? B. F. 2:45 P. M."

302 "D. R. Has Lloyd George resigned war secretaryship? B. F., N. Y., December 5, 12:27 p. m."

"D. R. What Ansonia now say Lloyd George? B. F., 1:10 p. m., Dec. 5."

More than that, Ward, the Cleveland manager of the office of the International News say- in his affidavit (fols. 140-141):

"The first time that I learned that B. E. Cushing was an employee of the International News Service was when I substituted for Agnew during Agnew's vacation in the summer of 1916; I then learned for the first time that Cushing was employed to notify the Cleveland Bureau of the International News Service of any local news, promptly, which originated in Cleveland or vicinity, and which came to him or to the Cleveland News, and which the Cleveland News would naturally carry; I also learned at this time from Agnew that Mr. Cushing occasionally called him on the telephone and told him that The Associated Press was carrying such and such a story. While I was so substituting for Agnew, during the summer, the said Cushing called me on the telephone several times and tipped me off to certain stories which had come into the office of the Cleveland News, through the Associated Press. He also, of course, gave me a number of items of news originating in Cleveland and vicinity. At that time, so far as I can remember, I did not send over the wire to the International News Service any information given me by Cushing, relative to Associated Press stories.

303 "After I became manager of the Cleveland Bureau of the International News Service, when I was tipped off that the A. P. was carrying a certain story, I would at once message New York, with the idea of getting an International News Service story for the Cleveland News, and for my Ohio State wire, so that I could legitimately serve our own subscribers with the same story that the A. P. had. Cushing never read me the A. P. story or bulletin, so far as I know; all he ever gave me was a tip as to the nature, character and source of the story. It was up to us to get our information, then, as best we could."

This is certainly not a convincing defense by the Cleveland Manager of a corporation charged with securing news improperly and the foregoing affidavit of Ward, when taken with the letter and telegrams of Paris I have mentioned, establishes that the first charge of the complainant is sustained by the moving papers.

The second charge against the defendant is the claim that defendant's employees read the news sheets of The Associated Press in

the editorial room of the New York American. The New York American was and is a member of the Associated Press; and had a Morkrum receiving machine in its editorial room on which the news appeared. James Finnerty who attended to the Morkrum machine has made an affidavit verified January 3, 1917, in which he states that Coates, an employee of the International News Service, the office of which was in the same building as that of the New York American, nightly examined the sheets containing the news received from The Associated Press and made copies or extracts. E. P. Koukol, who attended to the Morkrum machine one night a week, and Ronald S. Wishart, a Morkrum inspector, made a similar affidavit as to Frank B. Atwood, one of the editors of the International

News Service, and deposed that he constantly came to the
304 office of the New York American and examined Associated Press news sheets and at times took notes from them. That such was the practice of defendant's employees is further corroborated by the affidavit of George H. Eke, who was accustomed to go to the office of the New York American to inspect the Morkrum machine.

These charges are strenuously controverted in the affidavits filed by the defendant. It is to be noticed, however, that no affidavit appears either from Coates or Atwood, who are the persons said to have secured the complainant's news. This is very significant and in view of such an omission the positive affidavits that such things occurred should prevail over defendant's affidavits from persons who simply swear however positively, or even truthfully, that they never witnessed such practices.

It is well settled that the defendant had no right to obtain news from the members of The Associated Press, who were under an obligation only to use it for their own publications by employing their clerks to give the information as was done in the case of Cushing of the Cleveland News or by securing the information directly as was done through looking over the news sheets of the complainant in the office of the New York American. The news was gathered by The Associated Press at great cost and was entitled to be protected from abstraction in any such ways.

Board of Trade v. Christie Grain & Stock Co., 198 U. S., 236.
Exchange Telegraph Co. v. Gregory (1896), 1 Q. B. D. 147.
Exchange Telegraph Co. v. Central News Ltd. (1897) 2 Ch.
Div. 48;

Dodge v. Construction Information Co., 183 Mass. 62.

305 The foregoing acts whether or not done contrary to the directions of defendant's officers were done by persons acting for it within the general scope of their employment and the liability must rest upon the principal.

The strongest objection urged by the defendant to the granting of any injunction is based upon the charge that complainant has been guilty of continuous abstraction of defendant's news, and, therefore, should be debarred from seeking the aid of a court of equity.

I think the complainant has established that such practices if they have existed were contrary to the rules of The Associated Press and

the careful direction of its officers and manager and were limited to but a few sporadic instances at most. Now the doctrine that he who comes into equity must come in with clear hands does not recognize mere imputations of guilt based upon technical theories of agency. To invoke it a knowledge must exist on the part of the principal of the facts upon which the charge of unconscionable conduct is based and in the case of a corporation those facts must be brought home to the persons exercising general control over its affairs. No such knowledge has been shown on the part of the officers or manager of The Associated Press and the complainant consequently is not barred from seeking relief against the matters referred to in (1) and (2) supra, by reason of any thing complainant itself has done. On the other hand, complainant's counsel are entirely right in their contention that the liability of the defendant for the acts of its agents exists entirely irrespective of knowledge of its officers, and an injunction may issue to prevent the continuance. The legal questions involved in this conclusion are discussed by the New Jersey Court of

Errors and Appeals in a clear and convincing opinion in the case of Vulcan Detinning Company v. American Can Co., 72 N. J. Eq. 387, and I fully concur in the reasoning of that court.

The briefs contain so much discussion as to the practices of the complainant in obtaining news that I should perhaps refer briefly to the evidence on this point. Various employees of the Cleveland News have furnished affidavits to defendant that Cushing gave tips to The Associated Press of news he had received from defendant before it had ever been published. The subject matter of such tips, with two exceptions which I shall mention, is not related, and the text of the affidavits seem to indicate that Cushing was seeking information for the Cleveland News rather than imparting to The Associated Press any information he had received from the defendant. Smiley in his affidavit says, for example, that Cushing "when some story of great importance was carried on the wires of the International News Service, and which had not yet appeared in the copy sent to the telegraph desk of The Associated Press, and in a way which might be construed as a tip, inquired if they knew anything about said story." Field in his affidavit says Cushing would call up The Associated Press and "say, for example, 'Hearst has a Bulletin on a wreck down state. Can you find anything about it for me?'" Anson makes affidavit that Cushing would say: "for example: 'Hearst is carrying such and such a story out of such and such a place. What have you got on it?'" Shimansky likewise deposes that Cushing would say: "for example: 'Hearst says hundred drowned on Steamer Eastland, turned over in Chicago river. What have you?'"

It is manifest that these affidavits are intended to illustrate Cushing's practice rather than to relate any particular incident. Indeed, it is not clear that the news Cushing was telephoning about was not Cleveland local news. Moreover, McGuire, who was correspondent of The Associated Press in Cleveland, deposes that all the

307 news supplied by Cushing came to him; that the latter only gave him Cleveland local news and never any items which to his knowledge originated in the despatches of the International News Service. The only item of news specifically referred to in defendant's affidavits as having been furnished by Cushing to The Associated Press is that Pope Pius was still alive when the Cleveland News, on information derived from The Associated Press, had published an extra that he was dead. In answer to this charge is the positive affidavit of Frederick Roy Martin, the Assistant General Manager of The Associated Press, that the latter never reported that the Pope was dead on the occasion in question, and that it reported him dead the following night, and only after his death occurred. Cushing admits that he notified both complainant and defendant of the conflict in their stories as to the decision of the Adamson case, which resulted in the defendant securing the correct news (which it did not theretofore have) that the District Court had held the act unconstitutional. It is clear that Cushing was secretly employed by the defendant to furnish at least local news to it though such news belonged to complainant, while his employment by the complainant to furnish local news was on the recommendation of the Cleveland News and was known to every one in that office. Even if the officers of the defendant were innocent, it is also clear that Faris and Agnew sought and obtained from Cushing news that was other than local. The cases where Cushing gave any news of the defendant to The Associated Press were, I think, so sporadic and occasional as to be almost inevitable in a person in his position. He swears that he never made a practice of giving such information to The Associated Press and I believe he gave it, if at all, when he

was endeavoring to verify items of news he had received as
308 between the two agencies. An occasional lapse of this kind if it occurred is very different from the systematic disclosure by Cushing to the defendant of the news that The Associated Press carried. The secrecy of his employment by the defendant I think indicates the purpose of Agnew who was defendant's representative at Cleveland at the time.

The defendant further charges the complainant with getting tips of the Lusitania disaster and the Solvay explosion that came over the wires of the International News Service at Syracuse during the Barnes-Roosevelt trial. Complainant's affiant, Kloeber, swears that their news about the Lusitania came from the service of the Dow-Jones Company and in regard to the Solvay explosion that their representative at Syracuse telegraphed, "Can I do anything on explosion?" and complainant answered, "No, thanks; regular man should get the night story."

The complainant, last of all, charges the defendant with taking news from early editions of newspapers which are members of The Associated Press and selling it to defendant's customers in the same text or in a paraphrase of its own. In reply to this charge the defendant has submitted affidavits that in Washington, Chicago, Atlanta and elsewhere the representatives of The Associated Press have taken news from early editions of defendant's subscribers and there-

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after sold this news which defendant had secured. These affidavits contain general allegations rather than specific instances, and the allegations are denied by the complainant. In any event this practice of obtaining news originally derived from a competing news agency, but after publication, is quite different from that of securing the news of a rival agency surreptitiously before publication. Both defendant and complainant confessedly secure news or "tips"

so-called from first editions of newspapers supplied by their competitors, and both insist that they do not transmit any such news until an independent investigation is made and the news is verified. The methods employed by The Associated Press are set forth in its brief as follows:

"At this point there should be noted a clear and vital distinction between two kinds of use to which news taken from newspapers is put. The one use is for the purpose of obtaining the mere information or rumor that such and such an event has happened. Upon receipt of this information or rumor the news distributing service then proceeds to obtain the news by its own independent investigation from the original sources at its own expense, and the only story sent out is based solely upon the strength of such investigation. This has been a recognized practice among all news agencies and has existed by common consent.

"The other use is to send out a story based in whole or in part upon the news obtained from the newspaper without independent investigation. This use may include the sending of the bare statement of the fact of the event, or a more extended copy of the details of the story for the rival news agency. This practice has never been recognized as fair or proper and has never been adopted or allowed by the complainant. * * *

"This 'tip' when received by The Associated Press is used, not textually nor in any modified form as a despatch to the papers within its fold, for publication by them, but as a suggestion for investigation. An inquiry is set on foot and an independent news report may be developed and used."

It is evident from the foregoing statement, as well as from the proofs as a whole, that both sides think news when published by any subscribers to a competing news agency may properly be investigated, and, if verified, the result of the verification may be sold. It is to be noted, however, that the original news *if* ex-hypothesi the product of the labor and capital of him who gathers it and whether it be treated as a mere "tip" for further investigation, or as an authentic and final report, it cannot be used by a rival news agency without depriving the gatherer of the very thing which is of value to him, namely, the power to control the sale of the news he has gathered until sufficient time has elapsed to enable it to be published by all the newspapers he supplies. Moreover, there is something rather grotesque in going through the form of verifying a tip no matter how authentic it may be. In many cases the verification with modern telephonic communication would be so rapid that the time required for it would in no sense protect the original gatherer of the news. I cannot but feel that this matter of inde-

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pendent investigation is rather a question of business policy for the news service that receives the tip, than of substantive law or fair dealing. In other words, the real matter for consideration is whether news gathered and sold to a newspaper which publishes it can be used after publication by a competing news agency either as a tip for further investigation, or as authentic news for immediate distribution before sufficient time has elapsed for the news to be published within the territory in which the gatherer is engaged in the general dissemination of news. This question is most novel and important. I have said in the earlier part of this opinion that a news service is subjected to serious loss if its news is not protected from sale by a competing service until sufficient time has elapsed for publication by substantially all of its customers. This result might be secured if the news gatherer provided in its contracts that no publication of its news should be made by any of its subscribers until a given number of hours after receipt of the news. Such a plan would obviously be wholly impracticable and while giving theoretical protection would result in holding back the publication of the news sold for many hours. I think, therefore, that the only way to afford full protection to the news gatherer is to prevent the use of news by a rival either in the form of tips, or otherwise, for a sufficient time to enable the daily newspapers throughout the country to receive and publish the news. There is no real publication or purpose to abandon to the public until that time.

There have been various cases where the courts have protected those who have produced scenarios, plays, lectures and pictures after publication. And at common law the right remained after publication unless a purpose to dedicate to the public was plain.

Ferris v. Frohman, 223 U. S. 435.

Universal Film v. Copperman, 218 Fed. 577.

Tomkins v. Halleck, 133 Mass. 32.

Caird v. Sime, L. R. 12 App. Cas. 326.

Werckmeister v. American Lithographic Co., 134 Fed. 321.

Perhaps the closest analogy to the present situation is to be found in the stock and grain quotation cases, where it has been uniformly held that a rival quotation agency cannot secure the news in a broker's office, or upon an exchange, and sell it, even though these places may be open to all who desire to come in, and the news, except for this limitation, has become public property.

Board of Trade v. Christie Grain & Stock Co., 198 U. S. 250.

National Telegraph News Co. v. Western Union, 119 Fed. 294.

312 *Board of Trade v. Tucker*, 221 Fed. 305.

Board of Trade v. Kinsey Co., 130 Fed. 507.

Board of Trade v. Cella Commission Co., 145 Fed. 28.

See also:

Kiernan v. Manhattan Quotation Telegraph Co., 50 How. Pr. 194.

The right to protect lectures, plays and paintings from piracy, even after wide publicity, is sometimes placed by the court upon property rights and sometimes upon an implied contract arising from the relation of the creator to the audience. In the stock and grain quotation decisions the right has been likened to a trade secret. (*Board of Trade v. Christie*, supra.) But in all these cases there is little basis for anything like secrecy, and there is often no real contract not to disclose what is published. Indeed, the person who hears or sees whatever may be the product of another's labor is entitled to the fullest use and enjoyment short of competitive commercial employment just as the public is entitled to all the news that appears in a newspaper whatever may be its origin. The question in any given case is whether abandonment to the public has been so complete that no further justifiable cause remains for protecting these business interests from competitive interference. They do stand like trade secrets in that they are entitled to protection until surrendered to the public, but the real basis for invoking equitable aid either in the case of a lecture, a play or a trade secret is that one who has, with labor and expense, created something which while intangible is yet of value is entitled to such protection against damage as is not inconsistent with public policy.

The case of *Tribune Co. of Chicago v. Associated Press*, 116 Fed. 126, is confidently relied upon by the defendant. That was

313 a decision by Judge Seaman to the effect that news of the

South African War published in the *London Times*, and sent by cable to the *Chicago Tribune*, could not be copyrighted, and that a suit by the *Tribune* against the *Associated Press* to restrain infringement of copyright would not lie. This case was based solely upon doctrines of copyright law; the matter now under discussion was not referred to, and the decision was rendered by a single judge prior to that of the Circuit Court of Appeals of the Seventh Circuit, in the case of *National Telegraph News Co. v. Western Union*, 119 Fed. 294.

A most useful discussion of the legal questions here involved is found in the opinion of Judge Grosseup writing for the Court of Appeals of the Seventh Circuit, in the case of *National Telegraph News Co. v. Western Union*, supra. That court held that stock quotations received on a ticker in a broker's office, while not subject to copyright and in general available to any one who cared to examine them, would be protected from sale for one hour after receipt. Judge Grosseup said:

"* * * the business is, as an entirety, a lawful one. It meets a distinctive commercial want, and in some of its branches, at least, adds to the facilities of the business world. * * *

"The business involves, also, the use of property. This consideration brings it at once, in a general way, within the protecting care of the courts of equity. At first glance the immediate act restrained in the order below—the use of the information by a rival enterprise until after sixty minutes—may not appear as a trespass upon, or injury to, property, other than to the extent that there may be property in the printed matter. But such a view falls short of

looking far enough. Property, even as distinguished from property in intellectual production, is not, in its modern sense, confirmed to that which may be touched by the hand, or seen by the eye. What is called tangible property has come to be, in most great enterprises, but the embodiment, physically, of an underlying life—a life that, in its contribution to success, is immeasurably more effective than the mere physical embodiment. Such, for example, are properties built upon franchises, on grants of government, on good will, or on trade names, and the like. It is needless to say, that to every ingredient of property thus made up—the intangible as well as the tangible, that which is discernible to mind only, as well as that susceptible to physical touch—equity extends appropriate protection. Otherwise courts of equity would be unequal to their supposed great purposes and every day, as business life grows more complicated, such inadequacy would be increasingly felt.

Nowhere is this recognition by courts of equity of the intangible side of property better exemplified, than in the remedies recently developed against unfair competition in trade. An unregistered trade name or mark is, in essence, nothing more than a symbol, conveying to eye and ear information respecting origin and identity; as if the manufacturer, present in person, and pointing to the article, were to say, 'These are mine'; and the injunctive remedy applied is simply a command that this form of speech—this method of saying, 'These are mine'—shall not be intruded upon unfairly by a like speech of another.

Standing apart, the symbol of speech, is not property. Disconnected from the business in which it is utilized it cannot be monopolized. But used as a method of making an enterprise succeed, so that its appropriation by another would be a distinctive injury to the enterprise to which it is attached, the name, or mark, becomes at once the subject-matter of equitable protection. Here, as elsewhere, the eye of equity jurisdiction seeks out results, and though the immediate thing to be acted upon by the injunction is not itself, alone considered, property, it is enough that the act complained of will result, even though somewhat remotely, in injury to property.

Considering that in such case, equity, without question, lays its restraining hands upon the injurious appropriation of words that belong to the common language of mankind—than which nothing could be freer to the uses of men—there ought, it would seem, to be no difficulty, in the case under consideration, to find the power so manifestly needful.

The case under consideration may be summed up as follows: The business of appellee is that of a carrier of information. The gist of its service to the patron is, that, by such carriage, the patron acquires knowledge of the matter communicated earlier than these not thus served. The ticker, with its printed tape, is an implement or means only to this commercial end, which the patron, or the patron's patron, may utilize to the end intended, but may not appropriate to some end not intended, especially if such appropriation result

in injury to or total destruction of, the service. In short, the law being clearly inadequate to that purpose, equity should see to it, that the one who is served, and the one who serves, each gets what the engagement between them calls for; and that neither, to the injury of the other, shall appropriate more."

Professor Langdell in discussing trademarks and goodwill in his book entitled: "A Brief Survey of Equity Jurisdiction," has expressed much the same theory that Judge Grusseup elaborated in the opinion above quoted, and has pointed out that the wrong in such a case is not a tort to any particular thing, but

"to the estate of the person injured in the aggregate,—to the universitas of his estate (as the Romans call it), consisting as it does, in making him so much poorer. Of this description are many species of fraud, for example, the so-called infringement of a trademark, or of good-will,—which consists in wrongfully and fraudulently depriving another person of customers whose patronage he would otherwise have received."

I think sufficient analogies exist, particularly in the stock and grain quotation cases which I have cited, for holding that the damage to the complainant, which arises by taking from early editions of newspapers published by its members information which it has gathered at great cost, constitutes a tortious invasion of its rights unless, as a matter of public policy, adequate cause can be shown for holding that the partial disclosure to the public arising from the publication in some of the newspapers that are members of The Associated Press should deprive it of further right to restrict the use of its news.

The question remains whether there is any sufficient ground in public policy for depriving a news service of the fruits of its labors merely because a limited number of its customers have already been allowed to publish the news. Undoubtedly the public is legitimately interested in and benefited by the dissemination of news, and the dissemination when once begun should not be too long delayed, but no adequate reason occurs to me for allowing a competitor to sell and disseminate the news obtained through the efforts of the gatherer until the ordinary customers of the gatherer within the field in which it operates, have had sufficient time to receive and publish the news. The newspapers which have a contract with the news service which acquired the information will secure it at once, and the papers that have not such a contract can receive it from the rival agency within three or four hours, which ought to be sufficient time to protect the business interests of the news service that first required it. I can see no harm to the public in such an adjustment of the correlative rights of the parties. And this conclusion is most reasonable. Concededly the complainant can withhold news from the public and no one is entitled to it prior to publication. The object of its business, however, is to disseminate information. To serve its customers efficiently, it must communi-

cate its news at the earliest possible time. Its effort is to give out its news at once for immediate publication. The publication intended, and generally effected, is one substantially simultaneous throughout the country, that is, so far simultaneous as geographical differences in time may permit. It cannot, therefore, be said that the complainant has in any fair sense caused its news to be published and thus abandoned it to the public until all the members whom it serves have been put in a position where publication of the news has been possible. Viewed in this reasonable light, the argument that the complainant has no further right to protection after the first publication of its news loses much of its force. The news is in effect unpublished and unavailable for use by competing news agencies until the time for general publication has elapsed, since only then can the complainant be truly said to have abandoned its news to the public by an unrestricted publication. Nor can it in my opinion be said that the complainant is barred from asserting its rights in this case after publication, because it has acted inequitably in making use of "tips" received from the defendant. Both parties have in this respect acted in substantial accordance with common business practice and under the belief that

318 their conduct was technically lawful. Under such circumstances neither should be debarred from asserting its legal right and obtaining the protection of a court of equity, but a court of equity should only enforce this right if the other party to the suit is awarded similar protection.

The defendant urges that it should not be subjected to an injunction restraining it from abstracting complainant's news because any acts of this nature which have been done were contrary to defendant's rules and the directions of its officers. I should be inclined to take this view were it not for the fact that the conduct of the representatives of defendant in responsible positions has shown such a serious and systematic infraction, of complainant's rights in numerous cases specified in careful detail, that I cannot think anything less than an injunction sufficient to meet the situation. Furthermore, defendant, if I understand its argument, still insists upon its right to obtain the Cleveland local news in the manner heretofore practiced, although this is clearly in violation of complainant's rights. Upon the proofs offered, a preliminary injunction should be granted to the complainant restraining the defendant from abstracting its news before publication.

While I am personally satisfied after giving the matter most deliberate and careful consideration that the right exists to prevent the sale by a competing news agency of news which is taken from early publications of complainant's members before sufficient time has elapsed to afford opportunity for general publication, and that the existing practice amounts to unfair trade, yet the matter is one of first impression and my decision cannot be regarded as sufficiently free from doubt to justify the granting of a preliminary injunction upon this branch of the case.

Settle order on notice.

March 29, 1917.

A. N. H., D. J.

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Assignment of Errors.

United States District Court, Southern District of New York.

In Equity. E. 14-59.

THE ASSOCIATED PRESS, Complainant,

against

INTERNATIONAL NEWS SERVICE, Defendant.

Now comes the Associated Press and files this, its assignment of errors, complaining as follows:

1. The Court erred in denying a writ of injunction restraining defendant from copying, receiving, selling, transmitting, using, or causing to be copied, received, sold, transmitted or used, the news furnished by complainant from bulletins issued by the complainant, or any of its members, or from editions of newspapers published by any of complainant's members.

Dated, New York, April 13, 1917.

THE ASSOCIATED PRESS,

By STETSON, JENNINGS & RUSSELL,

Its Solicitors.

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Assignment of Errors on Cross-appeal.

United States District Court, Southern District of New York.

In Equity. No. E. 14-59.

THE ASSOCIATED PRESS, Complainant,

against

INTERNATIONAL NEWS SERVICE, Defendant.

Now comes the defendant, International News Service, and with its petition for a cross appeal, files the following assignment of errors, upon which it will rely in the prosecution of its cross appeal in the above entitled cause.

(1) That the Court erred in enjoining and restraining the defendant from inducing, procuring or permitting any telegraph editors or other employees or agents of the complainant or any of its members or of any newspaper or newspapers owned or represented by them or any of them, or any such members, to communicate to defendant or to permit the defendant to take or appropriate, for consideration or otherwise, any news received from or gathered for complainant, and from purchasing, receiving, selling, transmitting, or using any news so obtained.

(2) That the Court erred in enjoining and restraining the de-

defendant from inducing or procuring, directly or indirectly, any of complainant's members or any of the newspapers represented by them, to violate any of the agreements fixed by the Charter and By-Laws of the complainant.

(3) That the Court erred in finding that defendant has engaged in obtaining and selling to its clients for publication by them complainant's despatches before their publication, and has employed and paid one, B. E. Cushing, the telegraph editor of the Cleveland News, a paper holding a certificate of membership from The Associated Press, to furnish it, for sale to its clients and publication by them, not only with the local news of the Cleveland District but also with a substantial amount of other and particularly of Foreign news which has come to the said Cleveland News from The Associated Press and over its wire; and that such service by the said B. E. Cushing was in violation of his obligations as an employee of the said Cleveland News and of its obligations as a member of The Associated Press.

(4) That the Court erred in finding that defendant has repeatedly taken news furnished by the complainant to its member the New York American, by causing the despatches to be taken on its behalf after being received over the Morkrum receiving machine, before publication thereof.

(5) That the Court erred in finding that the defendant has sold to its clients for publication by them the complainant's news, taken from bulletin boards or early editions of newspapers published by complainant's members.

(6) That the Court erred in finding that the defendant has transcribed and re-written complainant's news from bulletin boards or early editions of newspapers published by complainant's members and sold the same to its clients for publication.

322 (7) That the Court erred in finding that the defendant has transcribed or re-written complainant's news, taken either from bulletin boards or early editions of newspapers published by complainant's members and sold the same to its clients for publication by them, without original investigation by its own agencies and without expense to itself, and in finding that the defendant has thereby enabled its own subscribers to publish news despatches of the complainant in competition with complainant's members.

(8) That the Court erred in finding that the complainant has not authorized any of the practices specified in assignments 3, 4, 5, 6 and 7, *supra*, and that such instances as may have occurred, have been contrary to its rules.

(9) The Court erred in finding that the complainant's rules and practices authorized by its officers, have been to use defendant's published dispatches only as rumors.

(10) The Court erred in finding that the defendant has acted unfairly in competition with the complainant.

(11) The Court erred in finding that the defendant has greatly injured and is greatly injuring the complainant and its members, and has been, and is, depriving them of the just benefits of their labors and expenditures, and has been and is causing them irrep-

arable damage, for which they are without adequate or substantial relief except by the interposition of this Court by its order of restraint and injunction.

(12) The Court erred in failing to find that the complainant was not entitled to equitable relief because of its unclean hands.

323 (13) The Court erred in failing to find that the complainant employed and paid B. E. Cushing, the telegraph editor of the Cleveland News, one of defendant's customers, to furnish complainant, for sale to its members and publication by them, the news which defendant had transmitted and furnished to the Cleveland News prior to the publication of such news by the Cleveland News.

(14) The Court erred in finding that the practice of re-writing news from published newspapers or published bulletins is unlawful and inequitable.

(15) The Court erred in failing to find that the news when once published, either in a newspaper or on a bulletin board is public property and may be used by any one desiring to use the same.

Wherefore, defendant prays that so much of the said order as grants the injunction prayed for by the complainant be reversed and a proper decree entered on the record.

WILLIAM A. DE FORD,

Solicitor for Defendant.

110 Nassau Street, Borough of Manhattan, New York City.

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Stipulation.

United States District Court, Southern District of New York.

THE ASSOCIATED PRESS, Complainant,

vs.

INTERNATIONAL NEWS SERVICE, Defendant.

It is hereby stipulated and agreed, that the foregoing is a true transcript of the record of the said District Court in the above-entitled matter as agreed on by the parties.

Dated April 16, 1917.

STETSON, JENNINGS & RUSSELL,

Attorneys for Complainant.

WM. A. DE FORD,

Attorney for Defendant.

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Clerk's Certificate.

UNITED STATES OF AMERICA,

Southern District of New York, ss:

THE ASSOCIATED PRESS, Complainant,

VS.

INTERNATIONAL NEWS SERVICE, Defendant.

I, Alexander Gilchrist, Jr., Clerk of the District Court of the United States of America for the Southern District of New York, do hereby Certify that the foregoing is a correct transcript of the record of the said District Court in the above-entitled matter as agreed on by the parties.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, this 16th day of April in the year of our Lord one thousand nine hundred and seventeen and of the Independence of the said United States the one hundred and forty-first.

ALEXANDER GILCHRIST, JR., *Clerk.*

326 United States Circuit Court of Appeals for the Second Circuit.

THE ASSOCIATED PRESS, Complainant-appellant,

against

INTERNATIONAL NEWS SERVICE, Defendant-appellant.

Before Hon. Henry Galbraith Ward, Hon. Henry Wade Rogers,
Hon. Charles Merrill Hough, Circuit Judges.

Cross-appeals from Order Entered in District Court for Southern District of New York Granting in Part Only the Preliminary Injunction Moved for by Plaintiff.

The writ in question (reduced to its lowest terms) restrains defendant from (1) procuring any agent or employee of plaintiff or any of its members, to give, or permit defendant to take for a consideration or otherwise any "news" received from or gathered for plaintiff, and from using or selling "any news so obtained." The injunction as granted also (2) enjoins defendant from procuring any newspaper represented by a member of plaintiff, from violating any agreement established by the charter or by-laws of plaintiff. Defendant alleges as error the issuance of the

327 writ above outlined.

Plaintiff's motion for relief asked for what the court below

granted, and further that defendant be enjoined from "copying, transmitting, selling, using, or causing to be copied, etc. any of the news furnished by plaintiff, from bulletins or newspapers published by a member" of plaintiff; and also from "competing with plaintiff" or its members by the unfair methods set forth in the bill. Injunction in substantially this form having been refused, plaintiff's appeal assigns such refusal for error.

Plaintiff is chartered in New York, under a general statute known as the Membership Corporation Law;—an act used for the organization of clubs and the like. It has no capital stock, its membership is selective, its business is the gathering of news all over the world, and the very great expense of such acquisition and transmission of information is borne by ratable levy or assessment upon its "members." Such members are practically about 950 newspaper owners distributed over the United States, but since such owners are frequently corporations, each corporate contributor must furnish a natural person to act as the legal member of this New York corporation. Such natural person is commonly called the "representative" of whatever newspaper he serves.

Defendant is a business corporation of New Jersey, has capital stock, is engaged as a rival in the same business as plaintiff, 328 and seeks a profit by selling the news or information it acquires, to customers, usually newspaper publishers.

Some publications are members of the Associated Press, and also customers of the International, but such double service is unusual. The parties hereto are undoubtedly in keen competition, as are usually the journals served by one or the other in any given city.

News received at a principal office of plaintiff is disseminated by telegraph or telephone to members at a distance, and (in the largest cities at all events) the offices of journals taking the fullest or largest Associated Press service, contain a machine (furnished by plaintiff) of the printing telegraph type, whereon the incoming news is shown automatically.

Every newspaper has of course a staff for the investigation of local happenings; if such paper is a member of plaintiff, it may be required to furnish to other members, and through plaintiff the news of its locality. This is an important part of the Associated Press scheme of news acquisition, viz: the co-operative feature.

Plaintiff's by-laws explicitly forbid any member from imparting to anyone Associated Press news "in advance of publication" or to "conduct his business in such a manner" that such news so furnished to him "may be communicated to any person, firm, corporation or association not entitled to receive the same,"—i. e. anyone not in good standing with and in the Associated Press.

329 The by-laws fix times of the day, before which publication of members' newspapers shall not occur, but the exhibition of bulletins at its offices within each paper's own territory is not a violation of these rules.

The business of gathering, stating, transmitting and selling statements of fact, as "news," did not originate with either party hereto, and the general methods of journalists in regard to this department

of activity are not in dispute, although (as appears hereafter) argument is hung on one old prevalent and undisputed habit of news-gatherers.

The principal facts upon which the court below based the first head of injunction are, that in Cleveland, Ohio, is published a newspaper which has Associated Press membership, and had for a considerable time in its employ a "telegraph editor," who would naturally receive incoming Associated Press items. This man (in accordance with by-laws) was charged with the transmission to plaintiff of Cleveland news possessed of more than local interest, and (properly) received pay from plaintiff for so doing.

Defendant corrupted this editor to apprise its agents of what he thus learned, and disseminated such news as the result of its own legitimate labor.

The second head of injunction, is based on the fact that there is in New York City a newspaper which has the service of both plaintiff and defendant. In its publication office is one of the
330 printing telegraph machines aforesaid, and the managers of said newspaper were induced to permit agents of defendant to enter their office, read what was "coming in" on the machine, and use the information thus acquired as the basis for telegraphic and other items, represented as the gatherings of its own employes from original sources; or at least they were not otherwise marked or described.

The material facts on which plaintiff moved for such injunctive relief as was refused below, are undisputed and as follows:

The natural place for receiving news from Europe (and indeed beyond) is the Atlantic Seaboard, and especially New York. Bulletins and early editions put out by members of plaintiff in the seaboard cities, are read by agents of defendant, and the substance thereof transmitted by wire westward, sold to defendant's customers, and by them printed, perhaps without any knowledge on their part, that the origin of, and sole basis for defendant's despatch is (e. g.) a bulletin posted in New York by a member of plaintiff, as the result of plaintiff's efforts; and certainly without any such information given them by defendant.

That this practice obtains, the answer admits, and justifies the same as matter of law, while alleging (in substance) that it is no more than a part or legitimate outgrowth of the newspaper habit of utilizing "tips."

This word signifies a bare intimation that something has happened. When such "tip" has been verified by independent
331 investigation on the part of the person receiving it, the facts may be and are disseminated as discovered by the journal or news agency getting the "tip." This practice may, we believe, be regarded as universal in news gathering circles.

The District Judge did not consider the utilization of "tips" as having any necessary bearing on the bodily appropriation and sale of news from early editions and bulletins; and felt satisfied that as matter of law plaintiff should have all the relief demanded, but regarding this last question as to the effect of "publication" by an

Associated Press paper, as one of first impression, refused the third demand of plaintiff, and remitted the matter to this court.

Peter S. Grosseup (Fred B. Jennings and Winfred T. Denison with him on the brief) for plaintiff;

Samuel Untermeyer and William A. de Ford (Henry A. Wise with them on the brief) for defendant.

HUGH, J.:

Defendant does not admit the facts above stated, as to procuring news from a telegraph machine in the office of a publisher; we think them fairly and fully proven. The evidence adduced for the defence on all the other points above mentioned, amounts to an assertion that what defendant is accused of wrongfully doing, plaintiff itself does and has done, and it is indeed a part of the news-gathering trade. Upon these propositions of fact, are rested the conclusions that (1) if the acts are wrong, plaintiff can not ask relief in equity when its own hands are unclean, and (2) if they are not wrong, i. e. illegal, no ground for relief exists. In our opinion the facts concerning the Cleveland episode are proved as stated; the plaintiff does not and has not copied and sold news from bulletins &c. of papers using defendant's service; and the "tip" habit though discouraged by plaintiff is incurably journalistic.

If the facts are as we have now found them, no party asserts that the acts restrained by the injunction as issued can be justified, either in law or morals. The right to proceed in equity to restrain inducing to breach of contract, we have recognized in *American &c. Co. vs. Keitel*, 209 F. R., 351; and the inequity of seeking profit by procuring the breach of any confidential relation by an employe is fully considered in *Peabody vs. Norfolk*, 98 Mass., 452, and *Dodge Co. vs. Construction &c. Co.*, 183 Mass. 62. The relations (*inter sesse*) of the members of the Associated Press are quite as confidential as those of master and trusted servant; the same reasoning applies. The order, so far as attacked by defendant's appeal, we consider granted in the fair exercise of discretion, and therefore proper.

Plaintiff's appeal, being from a refusal to grant injunction *pendente lite*, is of an infrequent kind, but still more rare is the presentation by such appeal of a clear cut question of law, upon undisputed facts, largely admitted in the pleadings. These facts enable us to render opinion without danger of even seeming to trench upon discretionary matters. We are practically requested to act by the District Court itself.

There is no difficulty in discriminating between the utilization of "tips," and the bodily appropriation of another's labors in accumulating and stating information. As matter of fact, one who on hearing a rumor or assertion, investigates and verifies it, whether with much or little effort, acquires knowledge by processes of his own; the result is his. In all the relations of life, most of what most of

us say we know, is but the result of verifying "tips," given, consciously or unconsciously by those in our environment. As matter of law or rule, it is impossible to say in advance what measure of investigation or verification must satisfy the censor, and the law does not seek to compel the vain or impossible. Doubtless there have been and will be again instances where the asserted or pretended investigation is but an excuse for appropriation, where no reasonable man would believe that any effort had been made except to conceal the absence of original work, but no such case is before us.

What is before us, and on the pleadings, is whether it is lawful, and if unlawful whether equity affords a remedy, for the admitted practice or habit of appropriating from bulletins and early
334 editions, the result of plaintiff's labors, and selling or otherwise gainfully using the same, either in the plaintiff's form or after passing it under the hand of a "re-write" man. This adjective is the trade description of one who changes the language or sequence of some composition of words; his labors do not change the substance, and are immaterial to the present controversy.

Defendant justifies bodily appropriation without independent investigation, because (1) all plaintiff ever has in possession or for communication are facts; (2) all defendant takes are facts, and (3) there can be no property in facts; but (4) if there be any such property it is lost eo instanti any member of plaintiff, in accordance with its own rules, publishes said facts by showing a bulletin or distributing an edition.

Plaintiff replies that it is (a) untrue that facts alone constitute its stock in trade; it deals in news; and (b) in news there is a property right recognized by reason and authority. Further (c) such property right enures to and persists in the plaintiff entity and each one of its members, and (d) is not exhausted by the act of a single member, which act is (e) improperly called by defendant publication, a word inappropriate to news, which is not literary property. Finally (f) plaintiff complains of defendant's admitted practices as unfair competition.

335 (1, 2, a) With the existence of a truth; with physical facts per se, neither plaintiff nor defendant is concerned; for them facts in that absolute sense are but as ore in a mountain or fish in the sea,—valueless unless and until by labor mined or caught for use. Nor are facts, even after ascertainment, news, unless they have that indefinable quality of interest, which attracts public attention. Neither is news always synonymous with facts, in the sense of verity; indeed much news ultimately proves fictitious,—yet it is excellent news notwithstanding. The word means no more (laying aside hoaxing and intentional falsehood) than apparently authentic reports of current events of interest.

When one copies a statement from a bulletin, he cannot assert himself to be possessed of any certain fact other than that of his own appropriation, the only fact he knows is that the bulletin-maker made an assertion;—but he has taken the news, because that is what the bulletin proclaimed, if its maker was skillful in his business.

(3, b) Whether there is or can be any property in facts per se, any more than there is in ideas or mental concepts, is a metaphysical query that can be laid aside, for there is no doubt either on reason or authority that there is a property right in news capable of and entitled to legal protection.

Property, *nomen generalissimum*, covers everything that has an exchangeable value, (*The Slaughter House Cases*, 16 Wall., 236 at 127); that news possesses the quality stated, seems obvious enough when it is observed that defendant takes it, in order to exchange it against dollars.

Special or trade news of divers kinds constitute property, as has often been decided (*Hunt v. Cotton Exchange*, 205 U. S., at 333; *Dr. Miles Co. v. Park*, 220 U. S. at 402; *Board of Trade v. Christie Co.*, 198 U. S. 236, affirming *Board of Trade v. Kinsey*, 130 F. R., 597, and citing with approval *National Telegraph & Co. v. Western Union Co.*, 119 F. R., 294; *Dodge Co. v. Construction & Co.*, 183 Mass., 62; *Exchange & Co. v. Central & Co.*, 2 Chan. (1897) 48; *Kiernan v. Manhattan & Co.*, 50 How. Pr., 194; *Board of Trade v. Cella & Co.*, 145 F. R., 28; and the point was assumed as settled by us in *Board of Trade v. Tucker*, 221 F. R., 305.)

There is no distinction entailing a legal difference, between news of the prices of corporate securities or commodities, of sporting events, or opportunities of profitable contracting, and news of current political, social or national events. Both require labor and expense in acquisition and transmission and dissemination, both have exchangeable values, and all alike lose by exposure the quality of news, which when it becomes history may remain important, but its commercial value has largely gone.

In the *National Telegraph* case (119 F. R., at 300) the property rights of the "great news agencies" were referred to as existing for the same reasons as obtained in respect of market quotations, and as we have indicated that decision was approvingly cited by the Supreme Court in the decision which we think settled the general proposition that all news as commercially sold is property (198 U. S., 236).

Assuming now the existence at some time, of some property right in plaintiff and to its news, the qualities producing exchangeable value, may be noted. Regularity and reliability, the fruit of organization and expenditure are of course necessary, but all that is vain unless the news is fresh, early, and if not always first in point of time, as prompt as any. Time is of the essence, and the basic question on this branch of the discussion, is how long does the property quality endure in news.

(4, c, d, e) Plaintiff is a membership corporation, its members cooperate in news-gathering, and each has in his own locality a several right to and ownership in the results of plaintiff's labors, viz., the news. The rights of members whether printing in Duluth or Galveston, New York or San Francisco, are equal, and the aggregate of their rights is the plaintiff's rights. If it be admitted that plaintiff's right of property in its news once existed, such existence was for the benefit of all its members, who however (owing to the earth's

method of rotation) cannot simultaneously exercise their several rights. Yet all exercise them at the same hour of their several days.

It is sought, if not to limit the doctrine of property in news, to the time during which it remains locked up in the breast of its gatherer; to interpret the decisions cited, as meaning only that news is "like a trade secret" (198 U. S., 250), lost when divulged in the course of business. Doubtless the analogy of restraining in equity wrongful knowledge of private business methods, was very useful in developing the doctrine that the "Courts ought to protect in every reasonable way" the "valuable rights of property" in information, (*Dodge Co. v. Construction, &c., Co.*, supra). But news is far more than a trade secret, for that must remain private to have its best value, while news is obtained for publicity alone. The true line of decision is indicated by the conclusion of the court in the *Christie* case,—that the "information will not become public property until the plaintiff has gained his reward" (198 U. S., at 251). Of course this means his reasonable reward, and as in that instance of trade quotations; divulging the same to one patron's office full of customers, did not reasonably terminate plaintiff's property; so here it is reasonable and just that each member of plaintiff, and plaintiff itself has a property right in its news until the reasonable reward of each member is received, and that means, (with due allowance for the earth's rotation) until plaintiff's most Western member has enjoyed his reward; which is, not to have his local competitor supplied in time for competition with what he has paid for. Surely this is a modest limit of rights.

But the foregoing is thought to be avoided, if not controverted, by dwelling on the word "publication," and insisting in substance that when (e. g.) a single New York paper (being a member of plaintiff) prints an item and sells a copy of that edition, all the world can copy as it pleases, to any extent and for any purpose, commercial or otherwise, because nothing but copyright protects the paper, and copyright does not cover statements of fact, but merely their literary dress or form.

The argument assumes that what plaintiff is interested in, and is trying to preserve, is literary property, or anything capable of copyright protection. It may be granted that the newspaper first giving out the news in question is copyrighted, that fact statements are not thereby protected as such, and that publication at common law terminated an author's rights in his manuscript and the fruits of his brain;* yet it still remains true that plaintiff's property in news is not literary at all, that it is not capable of copyright, and that "publication" as that word is used in the long line of decisions regarding literary rights, has no determinative bearing on this case. No one before ever attributed to publication a sense that would limit a lawful business to a few degrees of longitude. The word is legally very old, and of no one certain meaning. Publication of evidence in

*This is the general view, *Wreckmeister v. American, &c., Co.*, 134 F. R. 321; *Tribune Co. v. Associated Press*, 116 F. R., at 127; *Holmes v. Hurst*, 174 U. S., at 85. The opposite opinion is divertingly sustained by Mr. Augustine Birrell in "Authors in Court," found among "Res Judicatare."

equity or admiralty, of banns, of libel, etc., bear- but remote
 340 relation to the act which is thought once to have terminated
 an author's property, and now is a requisite to statutory copy-
 right. The thought however running through all the uses of the
 word, is an advising of the public, a making known of something to
 them for a purpose. It follows that the crucial enquiry is as to that
 purpose, is it lawful?

In all the "quotation" cases, it was held that the purpose of the
 publicity given, was not to let other people sell the quotations, and
 that that purpose was lawful,* as we put it in the Tucker case (221
 F. R., 307) "the posting of quotations * * * on a blackboard
 * * * is not the sort of publication which will terminate com-
 plainant's property right in them."

Thus it appears that not all publications are alike, and this is true
 even under the Copyright Acts. In *Werekmeister v. American, &c.,*
 Co., 134 F. R., 321, an opinion by Townsend, J., of which it has been
 said that it "left little to be added to the discussion," (*American*
Tobacco Co. v. Werekmeister, 207 U. S., at 299) that learned judge
 said that the use of "publication" without explanation or qualifica-
 tion was unfortunate. "The nature of the property in question in
 large measure determines the extent of public right." And it was
 held that unless there was an "abandonment of copyright or dedica-
 tion to the public," the owner of a thing capable of copyright
 341 could "expressly or by implication confine the enjoyment of
 such subject to some occasion or definite purpose."

We have assumed the newspaper first printing to be copyrighted,
 and no doubt its publication of its early edition was a general publi-
 cation; but it could not copyright, abandon nor destroy what it did
 not own; and it did not own plaintiff's property, in the news, nor
 that of its own fellow members in California. It did own the right
 to print in New York, but we discover no magic in the word "pub-
 lication" which takes away or terminates the rights of others.

Plaintiff's purpose of furnishing the (e. g.) New York paper with
 news, was to have a use made of it, not inconsistent with its own
 reasonable reward for its labor from its property, and that of all the
 other members of plaintiff. That measure of use and reward is law-
 ful; defendant deprives plaintiff thereof, and can show no equities;
 therefore defendant should be enjoined.

(f) Unfair competition like all oft uttered legal phrases has ac-
 quired rather a narrow use. In *McLean vs. Fleming*, 96 U. S., at
 251, a decision which is near the foundation of American case law on
 this subject, it was said that what equity enjoins the wrong-doer from
 depriving another of is "the advantage of celebrity." This thought
 has led to the feeling that what a plaintiff must be robbed of is the
 good-will and business ease resulting from his well known name, or
 the attractive dressing, wrapping or form of his product; that such
 robbery must be by limitation; and that the test of such imi-

**Board of Trade v. McDearmott*, 143 F. R., 188, is probably the most extreme
 instance of publicity, not amounting to abandonment, i. e. to the kind of
 "publication" here contended for.

342 tation is the effect upon the public or that part thereof likely to require wares such as those in controversy.

But this is not all the law, nor the only sort of unfairness in business methods, practiced by a competitor, and resulting in a continuing tort for which the law affords no adequate remedy,—that comes under the condemnation of equity. If defendant appropriated from an early edition of a New York paper what it wanted, and sold it, as extracted from said newspaper or as obtained per Associated Press, such action would still be obnoxious to what we have said concerning plaintiff's property rights in the news procured by itself, but since no deception would be wrought upon the public, no action for unfair competition would lie along the lines just indicated. When and if such appropriated news is sold as the fruit of defendant's own efforts, and under its own name, it is a plain case of deception,—assuming defendant's customers to be honorable men, anxious for good wares,—an assumption necessarily made in the absence of evidence to the contrary. Yet an action of such nature would lack the element of imitation, usually relied upon.

Equity however is not stayed because a name does not fit, or one is not at hand to accurately describe a wrong of a kind necessarily infrequent.

If defendant takes what someone else owns, and sells it as of right, in rivalry with the owner, such competition is more than unfair, it is patently unlawful, and the wider term comprises the narrower. But laying aside the right of property as the ultimate foundation of suit, the business method of selling in competition with plaintiff and its members, something falsely represented
343 as gathered by defendant otherwise than from bulletins and early editions *is* unfair, because it is parasitic and untrue. It is immoral, and that is usually unfair to some one.*

The flexibility of equity in granting relief against unfair methods of business was well stated by Ingraham, J., in *Barrow v. Marceau*, 124 App. Div., 655; "No hard and fast rule can be laid down, * * * where it is clearly established that an attempt is being made by one person to get the business of another by fraud and deceit, a court of equity will" intervene,** and in *Weinstock v. Marks*, 109 Cal., 529, it was said "Equity does not concern itself about the means by which wrong is done; it deals with the result of the fraud which moves the arm of the law and strikes down all efforts where fraud is practiced in securing the trade of a rival dealer."

To commercially distribute news not gathered by the sender,

*Decisions granting relief from competition without the usual imitation elements, but with the fraud apparent, are *Morgan v. Wendover*, 43 F. R. 420; *American & Co. v. De Lee*, 67 F. R. 329; *Barnes v. Pierce*, 164 F. R. 213; *Fonotipia Co. v. Bradley*, 171 F. R. 951; *Prest-o-Lite v. Davis*, 209 F. R. 917; *affd.* 216 F. R. 349; *Prest-O-Lite v. Heiden*, 219 F. R. 845.

**See this principle applied to enjoin a competitor from imitating the fashion of a model gown, bought from plaintiff by pretending to be an intending wearer. *Montegut v. Hickson* (App. Div.—Law Journal May 18, 1917).

is under the facts shown here an invasion of property rights; to send it out as one's own labor is marked by that dolus, which is fraud, and that is the basis of the doctrine of unfair competition in its wide sense.

344 Since, (to summarize the matter) any bodily taking for sale of plaintiff's news, without other labor than the perception thereof, before the reasonable reward of industry was secured as above indicated, was an unlawful invasion of property rights; and any sale thereof in competition with plaintiff under pretense of individual gathering thereof was a tort of the nature of unfair competition, the plaintiff's motion for injunction should have been granted substantially as made.

The order appealed from is modified, as indicated, and the cause remanded with directions to issue injunction against any bodily taking of the words or substance of plaintiff's news, until its commercial value as news has in the opinion of the District Court passed away. The exact form of words to be used, and the insertion or omission of a definite time limit on copying and sale, will be settled in the court below in any manner not inconsistent with this opinion. One bill of costs in this court to plaintiff.

345 United States Circuit Court of Appeals for the Second Circuit.

THE ASSOCIATED PRESS, Complainant-appellant,
against

INTERNATIONAL NEWS SERVICE, Defendant-appellant.

Before Ward, Rogers, and Hough, Circuit Judges.

WARD, *Circuit Judge* (dissenting in part):

A distributor of news, that is, of his information about things that have happened, neither invents nor composes nor manufactures anything, nor does he supply something which the public buys because it believes it originates with him and wants his article. Nor does he own the news, but only his knowledge of the news. Therefore analogies from property created or protected by the patent, copyright or trade mark statutes or by the principles regulating unfair competition are wholly inapplicable. The distributor's knowledge of news which he has gathered is his property so long as he keeps it to himself or communicates it only to others on condition that they will do so. He will be protected against any one who surreptitiously obtains this information from one of his members, subscribers or employees or by any form of pilfering or unfair means. Such were the cases of *Kiernan v. Manhattan Co.*,

346 50 How. Pr. 194; *Exchange Co. v. Gregory*, 1 Q. B. D. (1896); *Exchange Co. v. Central Co.*, 2 Chancery (1897) 48; *Peabody v. Norfolk*, 98 Mass. 452; *Dodge Co. v. Construction*

Co., 183 Mass. 62; Board of Trade v. Hadden Co., 109 Fed. Rep., 705; National News Co. v. W. U. T. Co., 119 Fed. Rep., 294; Illinois Commission v. Cleveland Tel. Co., *ib.* 301; Board of Trade v. Christie, 198 U. S., 236; Board of Trade v. Cella, 145 Fed. Rep., 28; Board of Trade v. Tucker, 221 Fed. Rep. 305; Hunt v. Cotton Exchange, 205 U. S., 333. In every one of these cases the court found that the defendant, got the news or the quotations surreptitiously and enjoined him for that reason. They abundantly support an injunction on the first grounds mentioned in the opinion of the court.

But if the distributor publishes, to use a word in this connection which I think has been unreasonably criticized, or abandons or dedicates or communicates his information to the world, his right of property in his information and his right to be protected against the use of it is gone.

The Supreme Court in the Christie case *supra*, p. 250, likened property in news to property in trade secrets. The two are strikingly similar. The owner of a trade secret will be given protection against any breach of confidence in respect to it by his employees and against any dishonest discovery of it by third parties. If, however, he communicated the secret to another without condition or if any one by his own efforts, for instance by analysis of a secret compound, learns how it is made, such persons may use it without any accountability to the original discoverer.

That the discoverer spent much time and money in discovering the secret would not be regarded as a reason why such persons learning it honestly should not make use of it.

In this case the complainant furnishes news to its members for the express purpose of their putting it on their bulletin boards and issuing it to the public in their newspapers. This is what they live on. After this it seems to me pure fiction to say that any property in the distributor survives. Everything in the nature of a confidence about the communication has ceased. That the rotation of the earth is slower than the electric current is a physical fact the complainant must reckon with in doing its business. That news dedicated to the public with the complainant's consent by the morning newspapers in New York can be telegraphed in time to appear in the morning newspapers of San Francisco cannot qualify the legal effect of the dedication. There being not the least evidence of anything fraudulent or underhanded in this method of obtaining news, I think the injunction should be denied.

At a Stated Term of the United States Circuit Court of Appeals, in and for the Second Circuit, Held at the Court-rooms in the Post Office Building, in the City of New York, on the 2nd Day of July, One Thousand Nine Hundred and Seventeen.

Present: Hon. Henry G. Ward, Hon. Henry Wade Rogers, Hon. Charles M. Hough, Circuit Judges.

ASSOCIATED PRESS, Complainant-appellant,

v.

INTERNATIONAL NEWS SERVICE, Defendant-appellant.

Cross-appeals from the District Court of the United States for the Southern District of New York.

This cause came on to be heard on the transcript of record from the District Court of the United States, for the Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged and decreed that the order of said District Court be and it hereby is modified and the cause remanded with directions to take further proceedings in accordance with the opinion of this court. Costs of this court to the complainant.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

C. M. H.

H. G. W.

349 Endorsed: United States Circuit Court of Appeals, Second Circuit.

Associated Press v. International News Service. Order for Mandate.

United States Circuit Court of Appeals Second Circuit. Filed Jul- 2, 1917. William Parkin, Clerk.

350 UNITED STATES OF AMERICA,

Southern District of New York, ss:

I, William Parkin, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby Certify that the foregoing pages, numbered from 1 to 349 inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the case of Associated Press against International News Service, as the same remain of record and on file in my office.

In Testimony Whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 2d day of July in the year of our Lord One Thousand Nine Hundred and seventeen and of the Independence of the said United States the One Hundred and forty-first.

[Seal United States Circuit Court of Appeals, Second Circuit.]

WM. PARKIN, *Clerk*.

UNITED STATES OF AMERICA, ss:

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the United States Circuit Court of Appeals for the Second Circuit, Greeting:

Being informed that there is now pending before you a suit in which The Associated Press is appellant and International News Service is appellee; and International News Service is cross-appellant and The Associated Press is cross-appellee, which suit was removed into the said Circuit Court of Appeals by virtue of appeals from the District Court of the United States for the Southern District of New York, and we being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Circuit Court of Appeals and removed into the Supreme Court of the United States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the tenth day of October, in the year of our Lord one thousand nine hundred and seventeen.

JAMES D. MAHER,

Clerk of the Supreme Court of the United States.

[Endorsed:] File No. 25,035. Supreme Court of the United States, No. 568, October Term, 1917. International News Service vs. The Associated Press. Writ of Certiorari. United States Circuit Court of Appeals, Second Circuit. Filed Oct. 16, 1917. William Parkin, Clerk.

File No. 25,035.

Supreme Court of the United States, October Term, 1917.

No. 568.

INTERNATIONAL NEWS SERVICE

against

THE ASSOCIATED PRESS.

It is hereby stipulated and agreed by and between the undersigned, the attorneys for the respective parties hereto, that the certified copy of the transcript of the record heretofore and on July 12, 1917, filed with the Clerk of the United States Supreme Court be taken as the

return to the writ of certiorari issued herein and dated October 10, 1917.

Dated, New York, October 15, 1917.

WILLIAM A. DE FORD,

Attorneys for International News Service.

STETSON, JENNINGS & RUSSELL,

Attorneys for The Associated Press.

To the Honorable the Supreme Court of the United States, Greeting:

The record and all proceedings whereof mention is within made having lately been certified and filed in the office of the Clerk of the Supreme Court of the United States, a copy of the stipulation of counsel is hereto annexed and certified as the return to the writ of certiorari issued herein.

Dated, New York October 16th, 1917.

[Seal United States Circuit Court of Appeals, Second Circuit.]

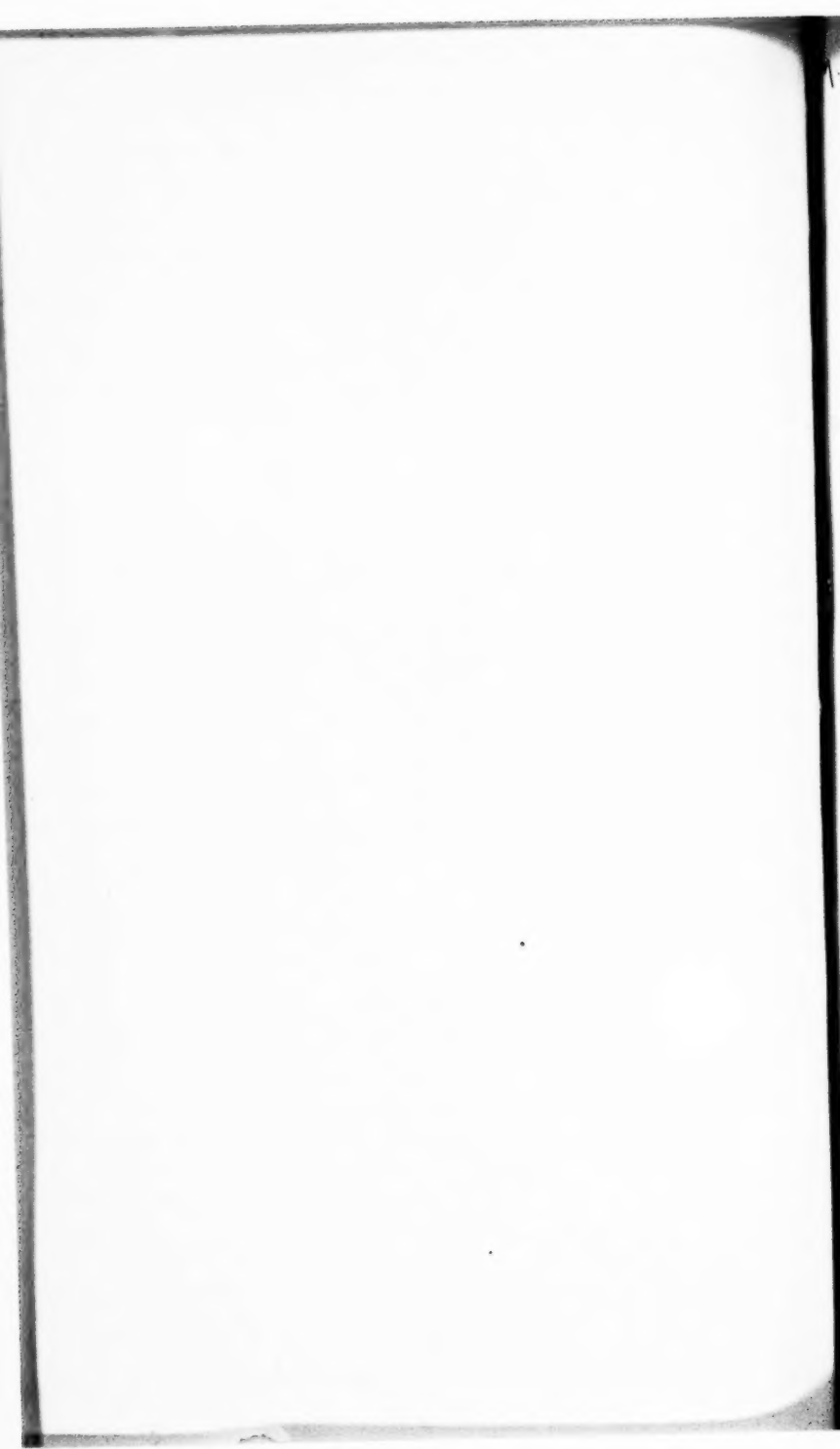
WM. PARKIN,

Clerk of the United States Circuit Court of

Appeals for the Second Circuit.

[Endorsed:] 568/26,035. United States Circuit Court of Appeals, Second Circuit. Associated Press v. International News Service. Return to Writ of Certiorari.

[Endorsed:] File No. 26,035. Supreme Court U. S., October Term, 1917. Term No. 568. International News Service, Petitioner, vs. The Associated Press. Writ of certiorari and return. Filed October 18, 1917.



JAN 18 1918

MAHER,

1816.

Supreme Court of the United States,

OCTOBER TERM, 1917.

INTERNATIONAL NEWS SERVICE,
Petitioner,

against

THE ASSOCIATED PRESS,
Respondent.

No. 568. 221

Motion to Advance.

2

Sirs:—PLEASE TAKE NOTICE that upon the annexed petition and upon all the papers and proceedings heretofore had herein, we shall move this Court at the October 1917 Term thereof to be held in the Capitol, in the City of Washington, District of Columbia, on the 21st day of January, 1918, at the opening of Court on that day or as soon thereafter as counsel can be heard, for an order directing that the argument of the appeal in this case be advanced and that the same be set down for a day certain to be fixed by the Court.

Dated, New York, Jan. 11, 1918.

3

Yours, &c.,

WILLIAM A. DEFORD,

Attorney for Petitioner,

Office and Post Office Address:

No. 140 Nassau Street, Borough

of Manhattan, New York City.

To: MESSRS. STETSON, JENNINGS & RUSSELL,

Attorneys for Respondent,

No. 15 Broad Street,

New York City.

4 **Supreme Court of the United States.**

OCTOBER TERM, 1917.

 INTERNATIONAL NEWS SERVICE,
 Petitioner,
vs.
 THE ASSOCIATED PRESS,
 Respondent.

No. 568.

5

Comes now the petitioner, by its counsel, and moves the Court to advance the above case for hearing upon a day convenient to the Court during the present term, (if possible April 15th) for the following reasons:

(1) The petitioner's application for *certiorari* in which the respondent concurred, was granted notwithstanding the fact that the judgment below was only interlocutory and not final and on a petition which alleged that the questions

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"are of such novelty and of such general public importance as to merit a *speedy* determination by this Court" (Petition, fol. 20).

We assume that the Court granted the petition without waiting for final judgment, because as stated in the petition, quoting from the opinion of Judge HORNER, "a clear cut question of law is presented upon undisputed facts," and also partly in appreciation of the importance of such speedy and final determination. Indeed the reasons stated in

the petition in favor of a final determination by 7
this Court are equally pertinent and cogent in
respect of a *speedy* determination.

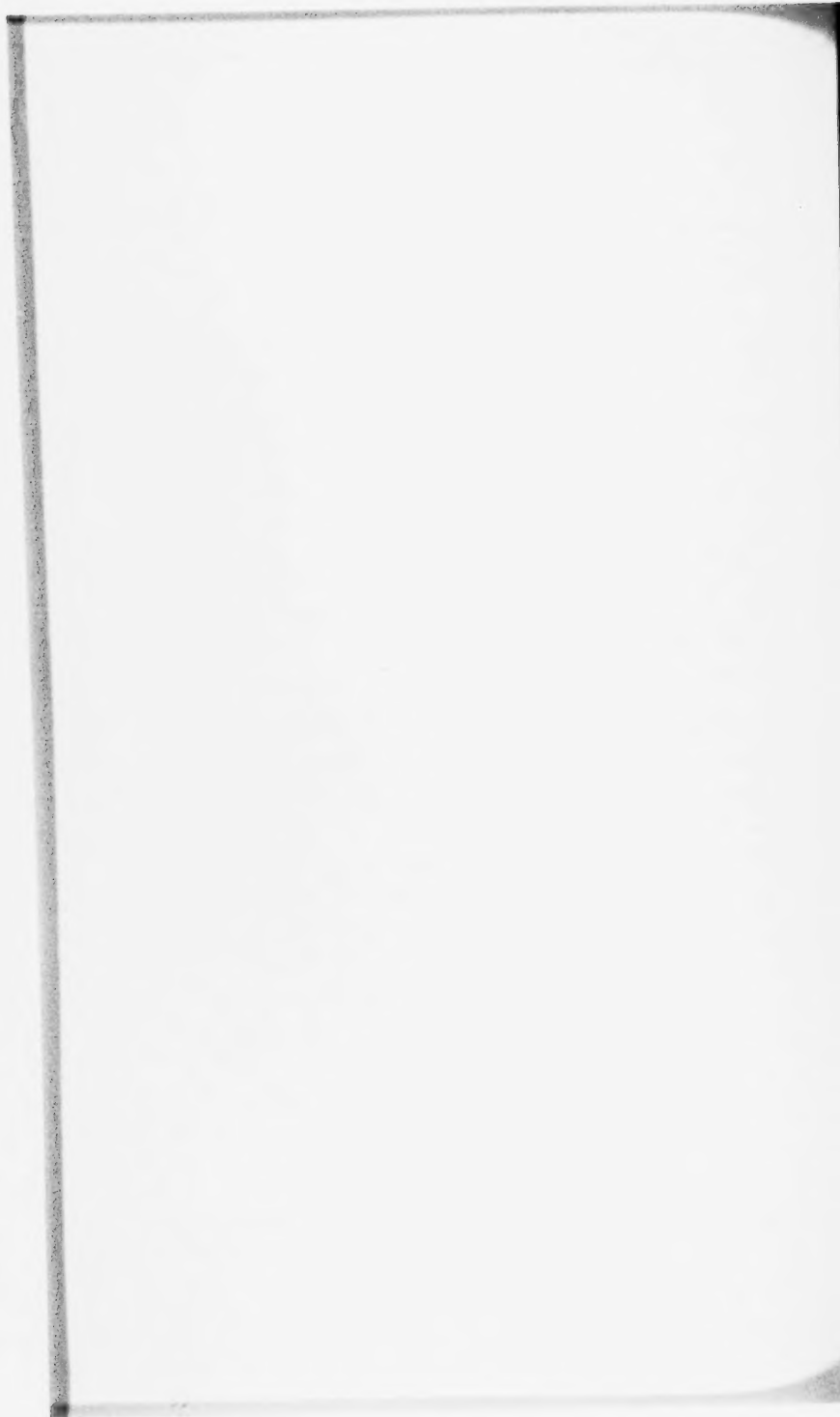
(2) The question involved is one in which all the
newspapers of the country are vitally interested.
Stated in general terms, without reference to the
specific parties, it is whether the commercial and
property rights of a news collecting agency in an
item of news collected by it continue after publica-
tion thereof, so as to make it unlawful for a com-
peting news agency or newspaper to publish or
distribute that item of news.

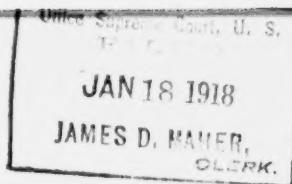
(3) Only the decision of this Court can forestall 8
costly litigation all over the country, in both
federal and state courts, and prior to such decision
great uncertainty will exist in the state of the law
on this question in jurisdictions not controlled by
the judgment below.

(4) We ask that this cause be set for April 15th
because of the impending departure for the South,
until approximately that date, of counsel for the
Petitioner made necessary by the condition of his
health.

SAMUEL UNTERMYER, 9
LOUIS MARSHALL,
HENRY A. WISE,
Counsel for Petitioner.

January 11, 1918.





SUPREME COURT OF THE UNITED STATES,
OCTOBER TERM, 1917.

INTERNATIONAL NEWS SERVICE,
Petitioner,

vs.

THE ASSOCIATED PRESS.

No. 503

221

RESPONDENT'S MEMORANDUM CONCURRING IN MOTION TO ADVANCE.

Respondent by its counsel concurs in this motion for the following reasons in supplement to those stated by petitioner :

(1) Respondent begs leave to refer to its memorandum, concurring in petitioner's application for *certiorari*, which it filed largely because of the necessity of a speedy determination and for reasons equally pertinent and cogent upon this motion.

(2) Until the decision of this court, respondent and its members must either submit to irreparable loss in the jurisdictions not controlled by the judgment below, or undertake a multitude of cases in other jurisdictions to enforce its rights.

(3) In view of the fact that this Court has taken up the case by writ of *certiorari*, Courts below will be reluctant to grant injunctions necessary to protect respondent's rights until this Court has finally determined the questions involved, in cases

which complainant may, as above stated, be required to bring in other jurisdictions.

(4) The violations of complainant's rights have been, still are and will be most serious during the continuance of the War because of the great expense to which complainant is put in collecting the War news and the great public demand that exists for it.

(5) Only the decision of this Court can assure the news industry of a sound and indisputable foundation, and delay of such assurance will cause serious injury to the great mass of newspapers throughout the country.

F. W. LEHMANN,

F. B. JENNINGS,

W. T. DENISON,

Respondent's Counsel.

JUL 12 1917

JAMES D. MAHER

Supreme Court of the United States

OCTOBER TERM, 1917.

No.

221

INTERNATIONAL NEWS SERVICE,

Petitioner,

against

THE ASSOCIATED PRESS,

Respondent.

PETITION FOR WRIT OF CERTIORARI, NOTICE
OF PRESENTATION, AND BRIEF IN
SUPPORT OF PETITION.

WILLIAM A. DEFORD,

Solicitor for Petitioner,

140 Nassau Street,

New York City.

SAMUEL UNTERMYER,

LOUIS MARSHALL,

HENRY A. WISE,

Of Counsel for Petitioner

Supreme Court of the United States.

OCTOBER TERM—1917.

No. 568.

INTERNATIONAL NEWS SERVICE,
Petitioner,

against

THE ASSOCIATED PRESS,
Respondent.

Gentlemen:—PLEASE TAKE NOTICE that upon the annexed Petition of International News Service, a certified copy of the entire transcript of the record of this cause, including the proceedings in the Circuit Court of Appeals, for the Second Circuit, submitted herewith, and the Petitioner's Brief, also to be submitted on the presentation of the Petition, an application will be made to the Supreme Court of the United States, at a Term of said Court, appointed to be held at the Capitol, Washington, D. C., on the 1st day of October, 1917, at the opening of the Court on that day, or as soon thereafter as counsel can be heard, for a writ of certiorari to be directed to the United States Circuit Court of Appeals for the Second Circuit, to review the decree or order of said Court, rendered in the above cause on the 2nd day of July, 1917,

- 4 which modified the decree or order of the United States District Court for the Southern District of New York, entered in said Court on the 13th day of April, 1917, which granted, in part only, the preliminary injunction moved for by the Respondent, by directing a further preliminary injunction to issue against the Petitioner, restraining any bodily taking of the words or substance of Respondent's alleged news until its commercial value as news, shall, in the opinion of the said District Court, have passed away.

Dated, New York, July 5, 1917.

- 5 WILLIAM A. DEFORD,
Solicitor for Petitioner,
Office and Post Office Address:
140 Nassau Street,
Borough of Manhattan,
New York City.

SAMUEL UNTERMYER,
HENRY A. WISE,
Of Counsel for Petitioner.

- To:
6 MESSRS. STETSON, JENNINGS & RUSSELL,
Solicitors for Respondent,
15 Broad Street, New York City.

IN THE
SUPREME COURT OF THE UNITED
STATES,

7

OCTOBER TERM, 1917.

No. 568

INTERNATIONAL NEWS SERVICE,
Petitioner,

against

THE ASSOCIATED PRESS,
Respondent.

8

TO THE HONORABLE, THE SUPREME COURT OF THE
UNITED STATES:

International News Service, in support of this, its Petition for a writ of certiorari, to be directed to the United States Circuit Court of Appeals for the Second Circuit, to review a decree or order of said Court, rendered on the 2nd day of July, 1917, (upon which the mandate of said Court was issued on the 2nd day of July, 1917), which modified the decree or order of the United States District Court for the Southern District of New York, entered in said Court on the 13th day of April, 1917, which granted, in part only, the preliminary injunction moved for by the Respondent, by directing a further preliminary injunction to issue against the Petitioner, restraining any bodily taking of the words or substance of Respond-

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- 10 ent's alleged news until its commercial value as news shall in the opinion of the District Court, have passed away, respectfully shows:

I.—The Respondent, The Associated Press, is an Association organized in 1900, under the Membership Corporations Law of the State of New York, for the gathering and distribution of news. The Respondent has no stock, makes no reports and pays no dividends. It has upwards of nine hundred members, each owning or representing a daily newspaper in the United States. Each of these members is required by the charter and
 11 by-laws of the Respondent to supply to the Respondent the local news gathered by it in its district and is not permitted to supply such news to any other newspaper. All news collected by the Respondent is transmitted by it by telegraph, telephone or by other means to its members for publication in their newspapers.

II.—By means of these and other instrumentalities, the Respondent obtains early knowledge of events occurring throughout the world. This knowledge it imparts to its members who are publishers of newspapers for publication in the newspapers owned or represented by them. There-
 12 upon these newspapers issue bulletins and early editions wherein they publish the news so imparted. These early editions containing the news are sold to the public.

III.—The Petitioner, International News Service which is a corporation organized under the laws of the State of New Jersey is likewise engaged in the business of collecting and selling news to newspapers throughout the United States.

It has approximately 450 such customers many of whom take the service also of the Respondent. The annual cost of conducting the Petitioner's business is upwards of \$2,000,000 for its 450 customers whilst the Respondent alleges that it expends approximately \$3,000,000 per year in serving its 900 members. 13

IV.—The Respondent charges, among other things not material on this application, that the Petitioner has copied the news furnished by it to its members, from the early editions of the newspapers published by them after publication thereof by such members and also from bulletin boards maintained by such members in front of their newspaper offices, and that the news so copied is transmitted by the Petitioner over its telegraph wires and sold to its own members. The Respondent asserts that because it has had first knowledge of the occurrence of the events chronicled in these early editions and has informed its members of them, and through them, the public, no other newspaper or news-gathering agency may make use of such news even after it has been published to the world by all of Respondent's members wherever located. 14

V.—The Petitioner admits that it has its employees read daily many newspapers for items of news that they contain which it has not received through other sources, which it claims is and has always been the custom of the Respondent and of every other news agency and newspaper in this country and abroad and that it in common with the Respondent and all other news agencies 15

- 16 and newspapers rewrites these news items and supplies them to its subscribers.

VI.—Although the United States District Court for the Southern District of New York, at a term at which the Honorable Augustus N. Hand presided, granted the Respondent a preliminary injunction as to a part of the relief for which it prayed, so much of its prayer as sought to restrain the Petitioner from furnishing to its subscribers news taken by it from bulletins and early editions of newspapers published by members of the Respondent—in the opinion rendered,

- 17 the Court said:

“While I am personally satisfied, after giving the matter most deliberate and careful consideration, that the right exists to prevent the sale by a competing news agency of news which is taken from early publications of complainant’s members before sufficient time has elapsed to afford opportunity for general publication, and that the existing practice amounts to unfair trade, *yet the matter is one of first impression*, and my decision cannot be regarded as sufficiently free from doubt to justify the granting of a preliminary injunction upon this branch of the case.”

- 18

VII.—Both parties appealed to the United States Circuit Court of Appeals from the order of the District Court. That portion of the order from which the Petitioner appealed was affirmed, whilst the Respondent’s appeal from that portion which denied its prayer as hereinbefore shown, was sustained, by a divided Court. Judges Hough and Rogers united in an opinion in favor of the Respondent’s contention, Judge Ward writing a

dissenting opinion; both of which opinions are hereto annexed. In the majority opinion, Judge Hough said: 19

“Plaintiff’s appeal being from a refusal to grant injunction, *pendente lite*, is of an infrequent kind, but still more rare is the presentation by such appeal of a clear cut question of law, upon undisputed facts, largely admitted in the pleadings. These facts enable us to render opinion without danger of even seeming to trench upon discretionary matters. We are practically requested to act by the District Court itself.”

VIII.—A certified copy of the entire transcript of record of the case, including the proceedings in the Circuit Court of Appeals for the Second Circuit, is also submitted herewith as an exhibit to this Petition. 20

IX.—The controlling questions in this case, as to which there has been a division of opinion among the Judges who have thus far passed upon them, and by whom they are regarded as of first impression, are of such novelty and of such general public importance as to merit a speedy determination by this Court. They are in effect (1) whether there is any property in news, (2) whether, even if there is property in such news as is collected for the purpose of being published, it survives its publication in regular course by one to whom the news-gatherer communicates it for that very purpose, and (3) whether the acts complained of by the Respondent constitute unfair competition. In other words, to use the language of Judge Ward, whether 21

- 22 “—if the distributor ‘of news’ publishes
 * * * or abandons or dedicates or communicates his information to the world, his right of property in his information and his right to be protected against the use of it, is gone.”

The nature and importance of these questions will be more fully discussed in Petitioner’s Brief to be submitted herewith.

- 23 X.—The decision of the Circuit Court of Appeals for the Second Circuit in this case, which is sought to be reviewed by this court, is in conflict with and is directly opposed to the contention that was successfully made by the Respondent in the case of *Tribune Co. of Chicago vs. Associated Press*, reported in 116 Fed. R., 126, in which the Court sustained the defense of the Associated Press that there was no copyright or property in news and that the Associated Press could not be enjoined from taking bodily from early editions of the *London Times* and cabling here and distributing to its members certain war news, the exclusive rights to which the *Chicago Tribune* had secured by agreement from the *London Times* at great expense.
- 24

XI.—Although the injunction which the Circuit Court of Appeals has directed to be issued in this case, is a preliminary or interlocutory injunction, yet it is for all practical purposes determinative of this case. It affords to the Respondent all the relief that could be secured to it by a final decree. As shown by the opinion of Judge Hough—“a clear cut question of law” is

presented "upon undisputed facts." In effect, 25
therefore, this interlocutory injunction has all the
force of a final decree; and the record on which
it has been granted presents the whole case, so
that it has virtually been finally disposed of there-
on, as it could be by this Court, were it to review
the case by writ of certiorari. In the absence of
such review long delay would ensue before the
cause could be tried in the District Court and
again reviewed by the Circuit Court of Appeals
and to no purpose. Judgment would necessarily
be rendered against the Petitioner if the proof
were the same as is here presented, and the rec- 26
ord, then presented to this Court on an applica-
tion for a writ of certiorari, would be practically
the same as that now submitted. In the mean-
time the Petitioner would be enjoined from trans-
acting its legitimate business, and from collect-
ing and distributing news in what it believes to
be and in what has been universally accepted and
acted upon in the newspaper business as a lawful
method, one to which the Respondent and other
news gatherers, as the record shows, have uni-
formly resorted; all of which would subject it to
great financial loss and to extraordinary incon-
venience and embarrassment. 27

XII.—The bill of complaint alleges (Par. IX,
p. 20 of the Record), that the practices there
complained of have been continuously employed
by the petitioner ever since its organization (in
1909). It nowhere appears nor has it ever been
claimed or suggested that any protest against any
of such practices or request to discontinue the
same was ever made by the respondent to peti-

28 tioner or to anyone else prior to the beginning of this action or until the service of the papers in this suit.

WHEREFORE, your Petitioner prays that a writ of certiorari may issue out of and under the seal of this Court, directed to the United States Circuit Court of Appeals for the Second Circuit, commanding that Court to certify the case to this Court for review and determination, as provided in the Act of Congress known as the Judicial Code, or that your Petitioner may have such other and further relief in the premises as to this Court
 29 may seem appropriate and in conformity with the said Act.

And your Petitioner will ever pray.

INTERNATIONAL NEWS SERVICE,
 By FRED J. WILSON,
 General Manager and Treasurer,
 Petitioner.

WILLIAM A. DEFORD,
 Solicitor for Petitioner.

SAMUEL UNTERMYER,
 30 HENRY A. WISE,
 Of Counsel.

UNITED STATES OF AMERICA, } ss.: 31
Southern District of New York, }

FRED J. WILSON, being duly sworn, says, that he is the General Manager and Treasurer of INTERNATIONAL NEWS SERVICE, the Petitioner named in the foregoing Petition, that he has read the same and knows the contents thereof, and that the facts therein stated are true to the best of his knowledge, information and belief.

FRED J. WILSON.

Subscribed and sworn to before me }
 this 11th day of July, 1917. } 32
 THOMAS E. McENTEGART,
 (SEAL) Notary Public No. 41,
 New York County.

34

UNITED STATES CIRCUIT COURT OF
APPEALS

FOR THE SECOND CIRCUIT.

THE ASSOCIATED PRESS,
Complainant-Appellant,

against

INTERNATIONAL NEWS SERVICE,
Defendant-Appellant.

35

Before:

HON. HENRY GALBRAITH WARD,

HON. HENRY WADE ROGERS,

HON. CHARLES MERRILL HOUGH,

Circuit Judges.

Cross appeals from order entered in District Court for Southern District of New York granting in part only the preliminary injunction moved for by plaintiff.

36

The writ in question (reduced to its lowest terms) restrains defendant from (1) procuring any agent or employe of plaintiff or any of its members, to give, or permit defendant to take for a consideration or otherwise any "*news*" received from or gathered for plaintiff, and from using or selling "any news so obtained". The injunction as granted also (2) enjoins defendant from procuring any newspaper represented by a member of plaintiff, from violating any agreement

established by the charter or by-laws of plaintiff. Defendant alleges as error the issuance of the writ above outlined. 37

Plaintiff's motion for relief asked for what the court below granted, and further that defendant be enjoined from "copying, transmitting, selling, using, or causing to be copied, etc., any of the news furnished by plaintiff, from bulletins or newspapers published by a member" of plaintiff; and also from "competing with plaintiff" or its members by the unfair methods set forth in the bill. Injunction in substantially this form having been refused, plaintiff's appeal assigns such refusal for error. 38

Plaintiff is chartered by New York, under a general statute known as the Membership Corporation Law;—an act used for the organization of clubs and the like. It has no capital stock, its membership is selective, its business is the gathering of news all over the world, and the very great expense of such acquisition and transmission of information is borne by ratable levy or assessment upon its "members". Such members are practically about 950 newspaper owners distributed over the United States, but since such owners are frequently corporations, each corporate contributor must furnish a natural person to act as the legal member of this New York corporation. Such natural person is commonly called the "representative" of whatever newspaper he serves. 39

Defendant is a business corporation of New Jersey, has capital stock, is engaged as a rival in the same business as plaintiff, and seeks a profit by selling the news or information it acquires, to customers, usually newspaper publishers.

40 Some publications are members of the Associated Press, and also customers of the International, but such double service is unusual. The parties hereto are undoubtedly in keen competition, as are usually the journals served by one or the other in any given city.

News received at a principal office of plaintiff is disseminated by telegraph or telephone to members at a distance, and (in the largest cities at all events) the offices of journals taking the fullest or largest Associated Press service, contain a machine (furnished by plaintiff) of the printing telegraph type, whereon the incoming
41 news is shown automatically.

Every newspaper has of course a staff for the investigation of local happenings; if such paper is a member of plaintiff, it may be required to furnish to other members, and through plaintiff the news of its locality. This is an important part of the Associated Press scheme of news acquisition, viz: the cooperative feature.

Plaintiff's by-laws explicitly forbid any member from imparting to anyone Associated Press news "in advance of publication" or to "conduct his business in such a manner" that such news
42 so furnished to him "may be communicated to any person, firm, corporation or association not entitled to receive the same",—i. e. anyone not in good standing with and in the Associated Press.

The by-laws fix times of the day, before which publication of members' newspapers shall not occur, but the exhibition of bulletins at its offices within each paper's own territory is not a violation of these rules.

The business of gathering, stating, transmitting and selling statements of fact, as "news", did not originate with either party hereto, and the general methods of journalists in regard to this department of activity are not in dispute, although (as appears hereafter) argument is hung on one old prevalent and undisputed habit of news-gatherers. 43

The principal facts upon which the court below based the first head of injunction are, that in Cleveland, Ohio, is published a newspaper which has Associated Press membership, and had for a considerable time in its employ a "telegraph editor", who would naturally receive incoming Associated Press items. This man (in accordance with by-laws) was charged with the transmission to plaintiff of Cleveland news possessed of more than local interest, and (properly) received pay from plaintiff for so doing. 44

Defendant corrupted this editor to apprise its agents of what he thus learned, and disseminated such news as the result of its own legitimate labor.

The second head of injunction, is based on the fact that there is in New York City a newspaper which has the service of both plaintiff and defendant. In its publication office is one of the printing telegraph machines aforesaid, and the managers of said newspaper were induced to permit agents of defendant to enter their office, read what was "coming in" on the machine, and use the information thus acquired as the basis for telegraphic and other items, represented as the gatherings of its own employes from original sources; or at least, they were not otherwise marked or described. 45

The material facts on which plaintiff moved for such injunctive relief as was refused below, are undisputed and as follows:

46 The natural place for receiving news from Europe (and indeed beyond) is the Atlantic Seaboard, and especially New York. Bulletins and early editions put out by members of plaintiff in the seaboard cities, are read by agents of defendant, and the substance thereof transmitted by wire westward, sold to defendant's customers, and by them printed, perhaps without any knowledge on their part, that the origin of, and sole basis for defendant's despatch is (e. g.) a bulletin posted in New York by a member of plaintiff, as the result of plaintiff's efforts; and certainly without any such information given them by defendant.

47 That this practice obtains, the answer admits, and justifies the same as matter of law, while alleging (in substance) that it is no more than a part or legitimate outgrowth of the newspaper habit of utilizing "tips".

This word signifies a bare intimation that something has happened. When such "tip" has been verified by independent investigation on the part of the person receiving it, the facts may be and are disseminated as discovered by the journal or news agency getting the "tip". This practice may, we believe, be regarded as universal in news gathering circles.

48 The District Judge did not consider the utilization of "tips" as having any necessary bearing on the bodily appropriation and sale of news from early editions and bulletins; and felt satisfied that as matter of law plaintiff should have all the relief demanded, but regarding this last question as to the effect of "publication" by an Associated Press paper, as one of first impression, refused the third demand of plaintiff, and remitted the

matter to this court. (Opinion reported 240 F. R. 49
983).

PETER S. GROSSCUP (FRED B. JENNINGS and WIN-
FRED T. DENISON with him on the brief) for
plaintiff;

SAMUEL UNTERMYER and WILLIAM A. DEFORD
(HENRY A. WISE with them on the brief) for
defendant.

HOUGH, J.

Defendant does not admit the facts above
stated, as to procuring news from a telegraph ma-
chine in the office of a publisher; we think them 50
fairly and fully proven. The evidence adduced
for the defence on all the other points above men-
tioned, amounts to an assertion that what defend-
ant is accused of wrongfully doing, plaintiff itself
does and has done, and it is indeed a part of the
news-gathering trade. Upon these propositions
of fact, are rested the conclusions that (1) if the
acts are wrong, plaintiff cannot ask relief in
equity when its own hands are unclean, and (2)
if they are not wrong, *i. e.*, illegal, no ground for
relief exists. In our opinion the facts concerning
the Cleveland episode are proved as stated; the
plaintiff does not and has not copied and sold 51
news from bulletins, &c., of papers using defend-
ant's service; and the "tip" habit though dis-
couraged by plaintiff is incurably journalistic.

If the facts are as we have now found them, no
party asserts that the acts restrained by the in-
junction as issued can be justified, either in law
or morals. The right to proceed in equity to re-
strain inducing to breach of contract, we have rec-
ognized in *American &c. Co. vs. Keitel*, 209 F. R.

52 351; and the inequity of seeking profit by procuring the breach of any confidential relation by an employe is fully considered in *Peabody vs. Norfolk*, 98 Mass. 452; and *Dodge Co. vs. Construction &c. Co.*, 183 Mass. 62. The relations (*inter sese*) of the members of the Associated Press are quite as confidential as those of master and trusted servant; the same reasoning applies. The order, so far as attacked by defendant's appeal, we consider granted in the fair exercise of discretion, and therefore proper.

Plaintiff's appeal, being from a refusal to grant injunction *pendente lite*, is of an infrequent
 53 kind, but still more rare is the presentation by such appeal of a clear cut question of law, upon undisputed facts, largely admitted in the pleadings. These facts enable us to render opinion without danger of even seeming to trench upon discretionary matters. We are practically requested to act by the District Court itself.

There is no difficulty in discriminating between the utilization of "tips" and the bodily appropriation of another's labor in accumulating and stating information. As matter of fact, one who on
 54 hearing a rumor or assertion, investigates and verifies it, whether with much or little effort, acquires knowledge by processes of his own; the result is his. In all the relations of life, most of what most of us say we know, is but the result of verifying "tips", given, consciously or unconsciously by those in our environment. As matter of law or rule, it is impossible to say in advance what measure of investigation or verification must satisfy the censor, and the law does not seek to compel the vain or impossible. Doubtless there have been and will be again instances where the

asserted or pretended investigation is but an excuse for appropriation, where no reasonable man would believe that any effort had been made except to conceal the absence of original work, but no such case is before us. 55

What is before us, and on the pleadings, is whether it is lawful, and if unlawful whether equity affords a remedy, for the admitted practice or habit of appropriating from bulletins and early editions, the result of plaintiff's labors, and selling or otherwise gainfully using the same, either in the plaintiff's form or after passing it under the hand of a "re-write" man. This adjective is the trade description of one who changes the language or sequence of some composition of words; his labors do not change the substance, and are immaterial to the present controversy. 56

Defendant justifies bodily appropriation without independent investigation, because (1) all plaintiff ever has in possession or for communication are *facts*; (2) all defendant takes are *facts*, and (3) there can be no property in facts; but (4) if there be any such property it is lost *eo instanti* any member of plaintiff, in accordance with its own rules, publishes said facts by showing a bulletin or distributing an edition. 57

Plaintiff replies that it is (a) untrue that facts alone constitute its stock in trade; it deals in *news*; and (b) in news there is a property right recognized by reason and authority. Further (c) such property right enures to and persists in the plaintiff entity and each one of its members, and (d) is not exhausted by the act of a single member, which act is (e) improperly called by defendant *publication*, a word inappropriate to *news*, which is not literary property. Finally (f) plain-

58 tiff complains of defendant's admitted practices as unfair competition.

(1, 2, a) With the existence of a truth; with physical facts *per se*, neither plaintiff nor defendant is concerned; for them facts in that absolute sense are but as ore in a mountain or fish in the sea,—valueless unless and until by labor mined or caught for use. Nor are facts, even after ascertainment, *news*, unless they have that indefinable quality of interest, which attracts public attention. Neither is news always synonymous with facts, in the sense of verity; indeed much news ultimately proves fictitious,—yet it
59 is excellent news notwithstanding. The word means no more (laying aside hoaxing and intentional falsehood) than apparently authentic reports of current events of interest.

When one copies a statement from a bulletin, he cannot assert himself to be possessed of any certain fact other than that of his own appropriation, the only fact he knows is that the bulletin-maker made an assertion;—but he has taken the news, because that is what the bulletin proclaimed, if its maker was skillful in his business.

(3, b) Whether there is or can be any property in facts *per se* any more than there is in
60 ideas of mental concepts, is a metaphysical query that can be laid aside, for there is no doubt either on reason or authority that there is a property right in news capable of and entitled to legal protection.

Property, *nomen generalissimum*, covers everything that has an exchangeable value, (The Slaughter House Cases, 16 Wall. at 127); that news possesses the quality stated, seems obvi-

ous enough when it is observed that defendant 61
takes it, in order to exchange it against dollars.

Special or trade news of divers kinds constitute property, as has often been decided (*Hunt v. Cotton Exchange*, 205 U. S. at 333; *Dr. Miles Co. v. Park*, 220 U. S. at 402; *Board of Trade v. Christie Co.*, 198 U. S. 236, affirming *Board of Trade v. Kinsey*, 130 F. R. 507, and citing with approval *National Telegraph &c. Co. v. Western Union Co.*, 119 F. R. 294; *Dodge Co. v. Construction &c. Co.*, 183 Mass. 62; *Exchange &c. Co. v. Central &c. Co.*, 2 Chan. (1897) 48; *Kiernan v. Manhattan &c. Co.*, 50 How. Pr. 194; *Board of Trade v. Cella &c. Co.*, 145 F. R. 28; and the point was assumed as settled by us in *Board of Trade v. Tucker*, 221 F. R. 305). 62

There is no distinction entailing a legal difference, between news of the prices of corporate securities or commodities, of sporting events, or opportunities of profitable contracting, and news of current, political, social or national events. Both require labor and expense in acquisition and transmission and dissemination, both have exchangeable values, and all alike lose by exposure the quality of news, which when it becomes history may remain important, but its commercial value has largely gone. 63

In the *National Telegraph* case (119 F. R. at 300) the property rights of "the great news agencies" were referred to as existing for the same reasons as obtained in respect of market quotations, and as we have indicated that decision was approvingly cited by the Supreme Court in the decision which we think settled the general proposition that all news as commercially sold is property (198 U. S. 236).

64 Assuming now the existence at some time, of some property right in plaintiff and to its news, the qualities producing exchangeable value, may be noted. Regularity and reliability, the fruit of organization and expenditure are of course necessary, but all that is vain unless the news is fresh, early, and if not always first in point of time, as prompt as any. Time is of the essence, and the basic question on this branch of the discussion, is how long does the property quality endure in news.

65 (4, c, d, e) Plaintiff is a membership corporation, its members cooperate in news-gathering, and each has in his own locality a several right to and ownership in the results of plaintiff's labors, viz., the news. The rights of members whether printing in Duluth or Galveston, New York or San Francisco, are equal, and the aggregate of their rights is the plaintiff's right. If it be admitted that plaintiff's right of property in its news once existed, such existence was for the benefit of all its members, who however (owing to the earth's method of rotation) cannot simultaneously exercise their several rights. Yet all exercise them at the same hour of their several days.

66 It is sought, if not to limit the doctrine of property in news, to the time during which it remains locked up in the breast of its gatherer; to interpret the decisions cited, as meaning only that news is "like a trade secret" (198 U. S. 250), lost when divulged in the course of business. Doubtless the analogy of restraining in equity wrongful knowledge of private business methods, was very useful in developing the doctrine that the "Courts ought to protect in every reasonable way" the "valuable right of property" in information.

(*Dodge Co. v. Construction &c. Co., supra*). But news is far more than a trade secret, for that must remain private to have its best value, while news is obtained for publicity alone. The true line of decision is indicated by the conclusion of the court in the *Christie* case,—that the “information will not become public property until the plaintiff has gained his reward” (198 U. S. at 251). Of course, this means his reasonable reward, and as in that instance of trade quotations; divulging the same to one patron’s office full of customers, did not reasonably terminate plaintiff’s property; so here it is reasonable and just that each member of plaintiff, and plaintiff itself has a property right in its news until the reasonable reward of each member is received, and that means (with due allowance for the earth’s rotation), until plaintiff’s most Western member has enjoyed his reward; which is, not to have his local competitor supplied in time for competition with what he has paid for. Surely this is a modest limit of rights. 67 68

But the foregoing is thought to be avoided, if not controverted, by dwelling on the word “publication”, and insisting in substance that when (*e. g.*) a single New York paper (being a member of plaintiff) prints an item and sells a copy of that edition, all the world can copy as it pleases, to any extent and for any purpose, commercial or otherwise; because nothing but copyright protects that paper, and copyright does not cover statements of fact, but merely their literary dress or form. 69

The argument assumes that what plaintiff is interested in, and is trying to preserve, is literary property, or anything capable of copyright pro-

70 tection. It may be granted that the newspaper first giving out the news in question is copyrighted, that fact statements are not thereby protected as such, and that publication at common law terminated an author's rights in his manuscript and the fruits of his brain*; yet it still remains true that plaintiff's property in news is not literary at all, that it is not capable of copyright, and that "publication" as that word is used in the long line of decisions regarding literary rights, has no determinative bearing on this case. No one before ever attributed to publication a sense that would

71 limit a lawful business to a few degrees of longitude. The word is legally very old, and of no one certain meaning. Publication of evidence in equity or admiralty, of banns, of libel, etc., bear but remote relation to the act which is thought once to have terminated an author's property, and now is a requisite to statutory copyright. The thought, however, running through all the uses of the word, is an advising of the public, a making known of something to them for a purpose. It follows that the crucial enquiry is as to that purpose,—is it lawful?

72 In all the "quotation" cases, it was held that the purpose of the publicity given, was not to let other people sell the quotations, and that that purpose was lawful†; as we put it in the Tucker case (221 F. R. 307) "the posting of quotations . . . on a blackboard . . . is not the *sort of publi-*

*This is the general view, *Werckmeister v. American etc. Co.*, 134 F. R. 321; *Tribune Co. v. Associated Press*, 116 F. R. at 127; *Holmes v. Hurst*, 174 U. S. at 85. The opposite opinion is divertingly sustained by Mr. Augustine Birrell in "Authors in Court", found among "*Res Judicatae*".

†*Board of Trade v. McDermott*, 143 F. R. 188, is probably the most extreme instance of publicity, not amounting to abandonment, i. e., to the kind of "publication" here contended for.

cation which will terminate complainant's property right in them." 73

Thus it appears that not all publications are alike, and this is true even under the Copyright Acts. In *Werekmeister v. American &c. Co.*, 134 F. R. 321, an opinion by Townsend, J., of which it has been said that it "left little to be added to the discussion", (*American Tobacco Co. v. Werekmeister*, 207 U. S. at 299) that learned judge said that the use of "publication" without explanation or qualification was unfortunate. "The nature of the property in question in large measure determines the extent of public right". And it was held that unless there was an "abandonment of copyright or dedication to the public", the owner of a thing capable of copyright could "expressly or by implication confine the enjoyment of such subject to some occasion or definite purpose." 74

We have assumed the newspaper first printing to be copyrighted, and no doubt its publication of its early edition was a general publication; but it could not copyright, abandon nor destroy what it did not own; and it did not own plaintiff's property in the news, nor that of its own fellow members in California. It did own the right to print in New York, but we discover no magic in the word "publication" which takes away or terminates the rights of others. 75

Plaintiff's purpose in furnishing the (*e. g.*) New York paper with news, was to have a use made of it, not inconsistent with its own reasonable reward for its labor from its property, and that of all the other members of plaintiff. That measure of use and reward is lawful; defendant deprives plaintiff thereof, and can show no equities; therefore defendant should be enjoined.

- 76 (f) Unfair competition like all oft uttered legal phrases has acquired rather a narrow use. In *McLean vs. Fleming*, 96 U. S. at 251, a decision which is near the foundation of American case law on this subject, it was said that what equity enjoins the wrong-doer from depriving another of is "the advantage of celebrity." This thought has led to the feeling that what a plaintiff must be robbed of is the good-will and business ease resulting from his well known name, or the attractive dressing, wrapping or form of his product; that such robbery must be by limitation; and that the test of
- 77 such limitation is the effect upon the public or that part thereof likely to require wares such as those in controversy.

- But this is not all the law, nor the only sort of unfairness in business methods, practiced by a competitor, and resulting in a continuing tort for which the law affords no adequate remedy,—that comes under the condemnation of equity. If defendant appropriated from an early edition of a New York paper what it wanted, and sold it, as extracted from said newspaper or as obtained *per* Associated Press, such action would still be obnoxious to what we have said concerning plain-
- 78 tiff's **property rights in the news** procured by itself, but since no deception would be wrought upon the public no action for unfair competition would lie along the lines just indicated. When and if such appropriated news is sold as the fruit of defendant's own efforts, and under its own name, it is a plain case of deception,—assuming defendant's customers to be honorable men, anxious for good wares,—an assumption necessarily made in the absence of evidence to the contrary. Yet an

action of such nature would lack the element of imitation, usually relied upon. 79

Equity however is not stayed because a name does not fit, or one is not at hand to accurately describe a wrong of a kind necessarily infrequent.

If defendant takes what someone else owns, and sells it as of right, in rivalry with the owner, such competition is more than unfair, it is patently unlawful, and the wider term comprises the narrower. But laying aside the right of property as the ultimate foundation of suit, the business method of selling in competition with plaintiff and its members, something falsely represented as gathered by defendant otherwise than from bulletins and early editions is unfair, because it is parasitic and untrue. It is immoral, and that is usually unfair to some one.* 80

The flexibility of equity in granting relief against unfair methods of business was well stated by Ingraham, J., in *Barrow v. Marceau*, 124 App. Div. 655; "No hard and fast rule can be laid down. . . . where it is clearly established that an attempt is being made by one person to get the business of another by fraud and deceit, a court of equity will" intervene;** and in *Weinstock v. Marks*, 109 Cal. 529, it was said "Equity does not concern itself about the means by which wrong is done; it deals with the result of the fraud which moves the arm of the law and strikes down 81

*Decisions granting relief from competition without the usual imitation elements, but with the fraud apparent, are *Morgan v. Wendover*, 43 F. R. 420; *American etc. Co. v. DeLee*, 67 F. R. 329; *Barnes v. Pierce*, 164 F. R. 213; *Fonotipia Co. v. Bradley*, 171 F. R. 951; *Presto-Lite v. Davis*, 209 F. R. 917, *affd.* 215 F. R. 349; *Prest-o-Lite v. Heiden*, 219 F. R. 845.

**See this principle applied to enjoin a competitor from imitating the fashion of a model gown, bought from plaintiff by pretending to be an intending wearer. *Montegut v. Hickson* (App. Div.—Law Journal May 18, 1917.)

82 all efforts where fraud is practiced in securing the trade of a rival dealer."

To commercially distribute news not gathered by the sender is under the facts shown here an invasion of property rights; to send it out as one's own labor is marked by that *dolus*, which is fraud, and that is the basis of the doctrine of unfair competition in its wide sense.

83 Since, (to summarize the matter) any bodily taking for sale of plaintiff's news, without other labor than the perception thereof, before the reasonable reward of industry was secured as above indicated, was an unlawful invasion of property rights; and any sale thereof in competition with plaintiff under pretense of individual gathering thereof was a tort of the nature of unfair competition, the plaintiff's motion for injunction should have been granted substantially as made.

84 The order appealed from is modified, as indicated, and the cause remanded with directions to issue injunction against any bodily taking of the words or substance of plaintiff's news, until its commercial value as news has in the opinion of the District Court passed away. The exact form of words to be used, and the insertion or omission of a definite time limit on copying and sale, will be settled in the court below in any manner not inconsistent with this opinion. One bill of costs in this court to plaintiff.

UNITED STATES CIRCUIT COURT OF 85
APPEALS.

FOR THE SECOND CIRCUIT.

THE ASSOCIATED PRESS,
Complainant-Appellant,

against

INTERNATIONAL NEWS SERVICE,
Defendant-Appellant.

86

Before

WARD, ROGERS and HOUGH,
Circuit Judges.

WARD, Circuit Judge (dissenting in part):

A distributor of news, that is, of his information about things that have happened, neither invents nor composes nor manufactures anything, nor does he supply something which the public buys because it believes it originates with him and wants his article. Nor does he own the news, but only his knowledge of the news. Therefore analogies from property created or protected by the patent, copyright or trade mark statutes or by the principles regulating unfair competition are wholly inapplicable. The distributor's knowledge of news which he has gathered is his property so long as he keeps it to himself or communicates it only to others on condition that they will do so. He will be protected against any one who surreptitiously obtains this information from one of

87

- 88 his members, subscribers or employees or by any form of pilfering or unfair means. Such were the cases of *Kiernan v. Manhattan Co.*, 50 How. Pr. 194; *Exchange Co. v. Gregory*, 1 Q. B. D. (1896); *Exchange Co. v. Central Co.*, 2 Chancery (1897) 48; *Peabody v. Norfolk*, 98 Mass., 452; *Dodge Co. v. Construction Co.*, 183 Mass. 62; *Board of Trade v. Hadden Co.*, 109 Fed. Rep. 705; *National News Co. v. W. U. T. Co.*, 119 Fed. Rep. 294; *Illinois Commission v. Cleveland Tel. Co.* *ib.* 301; *Board of Trade v. Christie*, 198 U. S. 236; *Board of Trade v. Cella*, 145 Fed. Rep. 28; *Board of Trade v. Tucker*, 221 Fed. Rep. 305; *Hunt v. Cotton Exchange*, 205 U. S. 333. In every one of these cases the court found that the defendant got the news or the quotations surreptitiously and enjoined him for that reason. They abundantly support an injunction on the first grounds mentioned in the opinion of the court.
- 89

But if the distributor publishes, to use a word in this connection which I think has been unreasonably criticised, or abandons or dedicates or communicates his information to the world, his right of property in his information and his right to be protected against the use of it is gone.

- 90 The Supreme Court in the *Christie* case, *supra*, p. 250, likened property in news to property in trade secrets. The two are strikingly similar. The owner of a trade secret will be given protection against any breach of confidence in respect to it by his employees and against any dishonest discovery of it by third parties. If, however, he communicates the secret to another without condition or if anyone by his own efforts, for instance by analysis of a secret compound, learns how it is made, such persons may use it without

any accountability to the original discoverer. 91
 That the discoverer spent much time and money
 in discovering the secret would not be regarded
 as a reason why such persons learning it honestly
 should not make use of it.

In this case the complainant furnishes news to
 its members for the express purpose of their putting
 it on their bulletin boards and issuing it to
 the public in their newspapers. This is what they
 live on. After this it seems to me pure fiction
 to say that any property in the distributor survives.
 Everything in the nature of a confidence 92
 about the communication has ceased. That the
 rotation of the earth is slower than the electric
 current is a physical fact the complainant must
 reckon with in doing its business. That news
 dedicated to the public with the complainant's
 consent by the morning newspapers in New York
 can be telegraphed in time to appear in the morning
 newspapers of San Francisco cannot qualify
 the legal effect of the dedication. There being
 not the least evidence of anything fraudulent or
 underhanded in this method of obtaining news, I
 think the injunction should be denied.

Supreme Court of the United States

OCTOBER TERM, 1917.

No. 568.

INTERNATIONAL NEWS SERVICE,

Petitioner,

against

THE ASSOCIATED PRESS,

Respondent.

BRIEF FOR PETITIONER ON APPLICATION FOR WRIT OF CERTIORARI.

WILLIAM A. DEFORD,

Solicitor for Petitioner,

140 Nassau Street,

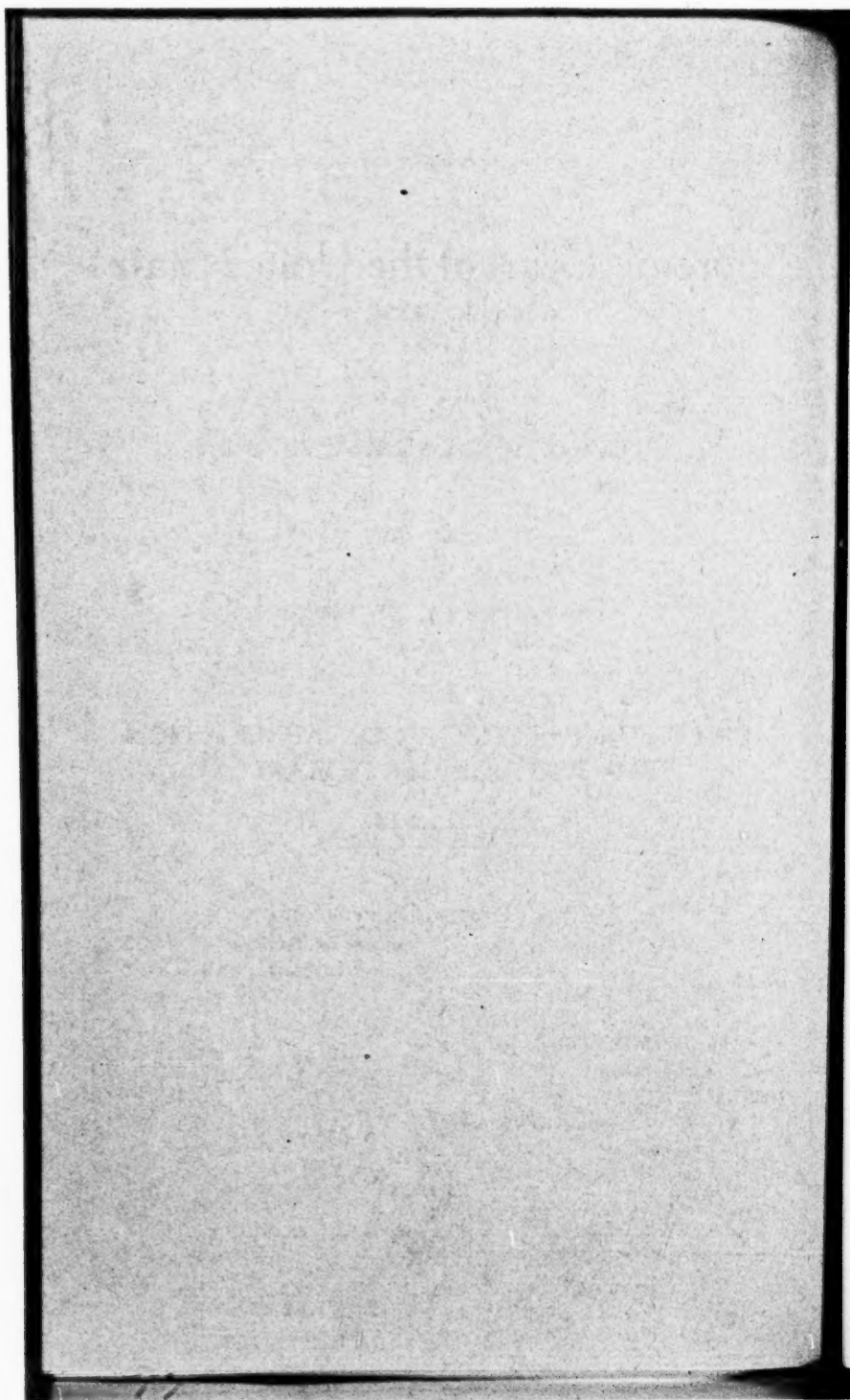
New York City.

SAMUEL UNTERMYER,

LOUIS MARSHALL,

HENRY A. WISE,

Of Counsel for Petitioner.



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IN THE
Supreme Court of the United States,

OCTOBER TERM, 1917,

No. 568.

INTERNATIONAL NEWS SERVICE,
Petitioner,

AGAINST

THE ASSOCIATED PRESS,
Respondent.

**Petitioner's Brief on Application for
Writ of Certiorari.**

The material facts on which this litigation depends are undisputed. They are set forth in the accompanying petition and will not be here repeated, except in so far as reference thereto may be made in the course of the ensuing argument, in which the nature of the questions, which are believed to be of great public importance to the commercial world, is discussed.

The judgment of the Circuit Court of Appeals was rendered on July 2, 1917. The petition for a writ of certiorari was filed in this Court on July 12, 1917.

The opinions of the United States District Court and of the Circuit Court of Appeals indicate that the case was regarded by both of them as novel and as one of first impression. In fact the former expressly stated that the question could not be regarded

“as sufficiently free from doubt to justify the granting of a preliminary injunction”

upon that branch of the case by which it was sought to enjoin the petitioner from utilizing news furnished by the respondent to its members and published by them in the early editions of their newspapers, after publication thereof by such members and from bulletin boards maintained by them in front of their newspaper offices. The Judges of the Circuit Court of Appeals were divided in opinion, Judge Ward dissenting and supporting the contention of the petitioner on the proposition just stated.

The injunction granted restrained the defendant, among other things,

“(c) From copying, obtaining, taking, selling, transmitting or otherwise gainfully using, or *from causing to be copied, obtained, taken, sold, transmitted or otherwise gainfully used the complainant's news*, either bodily or in substance, *from bulletins issued by the complainant or any of its members, or from editions of newspapers published by any of complainant's members*, until its commercial value as news to the complainant and all of its members has passed away.”

The respondent, which is a corporation organized under the Membership Corporation Law of the State of New York, claims to have upwards of 950 members, each owning or representing a daily newspaper in the United States. Since the granting of the injunction it has issued the following notice to the petitioner:

“TO THE INTERNATIONAL NEWS SERVICE, ITS OFFICERS, AGENTS AND EMPLOYEES:

The members of The Associated Press shown upon the list herewith served upon you take the service of The Associated Press and are obligated by its by-laws to furnish to it exclusively the local news of their respective districts. You are hereby notified that *all despatches hereafter published in newspapers shown upon said list credited to The Associated Press or not otherwise credited and also the local news published therein are the news of The Associated Press* and that any appropriation and use by you of any such news for sale or republication will constitute a violation of the injunction order granted in the above entitled action, dated July 7th, 1917.

THE ASSOCIATED PRESS.”

The list referred to in the notice gives the names of approximately 1,000 newspapers published in the various States of the Union.

The Court has found and the order recites that in 1915 the respondent expended about \$3,500,000.00 in gathering and distributing its news among its members and that petitioner expended in the same year upwards of \$2,000,000.00 for the same purpose. (Some newspapers take the service of both agencies.)

It appears also from the opinions of the Court below that for many years past it has been the

recognized custom of the petitioner and respondent through their principal agencies in their several localities throughout the country to read bulletins and early editions of the newspapers that are supplied with news by their respective agencies, for items of news that each agency failed to secure for its members or customers and for items of local news that have been independently gathered by the staffs of the respective newspapers. On the basis of the information thus gathered the agencies have been in the habit of furnishing their respective members or customers either "tips" or stories covering such items of news as they had themselves failed to secure.

The respondent claimed that it took only "tips" from the petitioner's news and from the newspapers supplied by the latter and that it investigated and re-wrote such stories based upon its investigations, and that the petitioner took the stories substantially as published by the respondent's members, whilst the petitioner claimed that there was no distinction between the practices of the two agencies with respect to taking such news from bulletins and early editions of newspapers. The petitioner contended in the Court below as to this feature of the case that inasmuch as this practice had been in force uninterruptedly for many years and ever since the organization of the two agencies the respondent is not now in a position to summarily ask the discontinuance of this practice by injunction and certainly not by an injunction before trial.

It is not, however, upon this feature of the case (to which reference is here made only in the interest of a complete understanding of the undisputed facts) but upon the startling legal proposi-

tion that *the news collected by the respondent and by each and all of its 950 members independently of the respondent* becomes and remains the exclusive property of the respondent after publication by the respondent and by its members

“until its commercial value to the (then) Petitioner and all its members has passed away”

that the present application is predicated.

According to the contentions of the respondent of the effect of this order, the petitioner is enjoined

(1) from permitting any of the respondent's employees or any of its 950 members to whom its service is furnished (the respondent being a corporation and not a voluntary association and none of its members being parties to the suit) to communicate any news received from the respondent and from purchasing or using any news so obtained even after such news has been published broadcast over the country by the respondent and its members;

(2) from procuring or inducing any of the respondent's 950 members or any of the newspapers represented by them to violate any of the provisions of the respondent's Charter and By-Laws. Which means, among other things, that the local and independent news collected by these newspapers, no part of the expenses of which has been borne by the respondent and in the collection and distribution of which the respondent has had no part, is here adjudged to be the *exclusive* property of the respondent *after* its publication by the newspapers by which it was collected;

(3) from using or copying either the news collected and distributed by the respondent or that appearing in bulletins or in any of the published editions of any of its 950 members

“until its commercial value as news to the complainant and all its members” (scattered from Maine to California, none of whom are parties to this suit) “has passed away.”

(See Order)

The legal and commercial effects of this order, if it is capable of any such extraordinary construction as is claimed for it by the respondent in the above quoted notice, will be to fasten upon this country the most dangerous and intolerable monopoly that has ever been known or conceived. Words fail to convey an adequate picture of the situation in the control of the world-news that would thus be created.

No newspaper can become a member of the Associated Press except (1) *by the affirmative vote of four-fifths of all of the 950 members* or (2) *by the Board of Directors with the unanimous consent of all the members in the locality in which the applicant newspaper is established or to be established who are under the by-laws entitled to the so-called “right of protest”* which means that any member entitled to protest may exclude a competitor or would-be competitor from membership. No person not a member can secure the services indirectly or through a member.

Consider this situation in connection with the facts asserted by the respondent (1) that it expends \$3,500,000.00 per year in its collection and distribution of news and (2) that under its by-laws all the local news collected by its 950 members at an additional probable cost of many millions of dollars per year, becomes and remains the exclusive property of the Associated Press without pay, and it requires no stretch of the

imagination to visualize the absolute domination the Associated Press will have over the news of the country through the prohibitive cost and organization that would be required to collect the world-news nor how impossible it will be for any newspaper to start in business or for any existing paper to remain in business without its franchise, which it may give or withhold at its own sweet will!

POINTS.

I.

Although the decree of the Circuit Court is interlocutory, that fact does not preclude this court from granting a writ of certiorari. There is abundant precedent for such action and the exercise of the power is peculiarly appropriate in this case in which the Courts below state that the facts are undisputed and that the case is novel and one of first impression.

The power given to this Court to review cases in which the decision of the Circuit Court of Appeals is made final,

“was intended to vest in this court a comprehensive and unlimited power. The power thus given is not affected by the condition of the case as it exists in the Court of Appeals. It may be exercised before or after any decision by that court, and irrespective of any

ruling or determination by that court. All that is essential is that there be a case pending in the Circuit Court of Appeals and of those classes of cases in which the decision of that court is declared a finality, and this court may, by virtue of this clause, reach out its writ of certiorari and transfer the case here for review and determination."

Forsyth v. Hammon, 166 U. S. 506.

Lau Ow Bew v. United States, 144 U. S. 58.

"The question at what stage of the proceedings and under what circumstances the case should be required by certiorari or otherwise to be sent up for review is left to the discretion of this court as the exigencies of each case may require."

American Construction Co. v. Jacksonville Ry. Co., 148 U. S. 372.

It may be issued before final decree if the Court is of the opinion that the facts of the case require an earlier interposition.

American Construction Co. v. Jacksonville Ry. Co., 148 U. S. 384.

The Conqueror, 166 U. S. 114.

The Three Friends, 166 U. S. 1.

Hamilton Shoe Co. v. Wolf Bros., 240 U. S. 258.

In the case first cited Mr. Justice Gray, after indicating that a writ of certiorari to review a decree of the Circuit Court of Appeals on appeal from an interlocutory order, may be granted where it is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of a cause, continues:

“In such an exceptional case, the power and the duty of this court to require, by certiorari or otherwise, the case to be sent up for review and determination, cannot well be denied, as will appear if the provision now in question is considered in connection with the preceding provisions for the interposition of this court in cases brought before the Circuit Court of Appeals. In the first place, the Circuit Court of Appeals is authorized, ‘in every such subject within its appellate jurisdiction,’ and ‘at any time,’ to certify to this court ‘any questions or propositions of law,’ concerning which it desires the instruction of this court for its proper decision. In the next place, this court, at whatever stage of the case such questions or propositions are certified to it, may either give its instructions thereon, or may require the whole record and cause to be sent up for its consideration and decision. Then follows the provision in question, conferring upon this court authority ‘in any such case as is hereinbefore made final in the Circuit Court of Appeals,’ to require, by certiorari or otherwise, the case to be certified to this court for its review and determination. There is nothing in the act to preclude this court from ordering the whole case to be sent up, when no distinct questions of law have been certified to it by the Circuit Court of Appeals, at as early a stage as when such questions have been so certified. The only restrictions upon the exercise of the power of this court, independently of any action of the Circuit Court of Appeals, in this regard, is to cases ‘made final in the Circuit Court of Appeals,’ that is to say, to cases in which the statute makes the judgment of that court final, not to cases in which that court has rendered a final judgment. Doubtless, this power would seldom be exercised before final judgment in the Circuit Court of Appeals, and very rarely indeed before the case was ready

for decision upon the merits in that court. But the question at what stage of the proceedings, and under what circumstances, the case should be required, by certiorari or otherwise, to be sent up for review, is left to the discretion of this court, as the exigencies of each case may require."

The lack of finality in a decree reversing an order of the Circuit Court granting a preliminary injunction, will not prevent a review in the Supreme Court on certiorari where the record presents the whole case to the Circuit Court of Appeals, so that it might have been finally disposed of by its decree.

Harriman v. Northern Securities Co., 197
U. S. 244.

The case last cited came to this Court upon a writ of certiorari to review an order of the Circuit Court of Appeals that had reversed an order of the Circuit Court granting a temporary injunction against the *pro rata* distribution of the stock of the Northern Securities Company. There as here, the preliminary injunction was granted upon *ex parte* affidavits prior to the hearing on the merits (p. 261).

Chief Justice Fuller, writing for the Court, said:

"In applying to this court for the writ of certiorari counsel for complainants insisted that the Circuit Court of Appeals had practically disposed of the entire controversy on the merits, although its decree only reversed the order of the Circuit Court granting the preliminary injunction. We accepted that view and granted the writ, in the circumstances, notwithstanding the decree was not final. In

our opinion the record presented the whole case to that court, in such wise, that it might properly have been finally disposed of in terms by its decree, in accordance with the well settled rule upon that subject. *Mast, Foos & Co. v. Stover Manufacturing Co.*, 177 U. S. 485, 495; *Castner v. Coffman*, 178 U. S., 168, 183; *Mayor, &c., of Knoxville v. Africa*, 77 Fed. Rep. 501.

In *Western Union Telegraph Company v. Pennsylvania Railroad Company, et al.*, 195 U. S. 540, 547, the Circuit Court had granted a preliminary injunction, 120 Fed. Rep. 981, which was reversed by the Circuit Court of Appeals, 123 Fed. Rep. 33. The telegraph company moved that the decree be modified so as to direct the dismissal of the bill. The motion was denied, and the telegraph company took an appeal to this court. Subsequently the Circuit Court *sua sponte* entered an order dismissing the bill, and the telegraph company appealed therefrom to the Circuit Court of Appeals, 195 U. S. 547. We then granted a certiorari, and considering both appeals together, affirmed the decree of dismissal.

In the present case we granted the certiorari, at the instance of complainants, before the case had gone back to the Circuit Court, and shall do what the Circuit Court of Appeals might have done, that is, finally dispose of the case by our direction to the Circuit Court."

In *Denver v. New York Trust Co.*, 229 U. S. 123, 133, the Supreme Court granted a writ of certiorari and reversed the decision of the Circuit Court of Appeals rendered on an appeal from an interlocutory order enjoining the issue of bonds for the construction of a municipal water plant. The case came here on certiorari, the in-

terlocutory injunction having been granted upon bill, cross-bill and various proofs (presumably by affidavit) on the preliminary hearing. This Court not only reversed the orders of the lower Courts, but dismissed the bills.

In the course of the opinion of the Court, Mr. Justice Van Devanter said:

“The exceptional power to review, upon certiorari, a decision of a Circuit Court of Appeals rendered on an appeal from an interlocutory order is intended to be and is sparingly exercised. *But there can be no doubt that the power exists where no appeal would lie from a final decree of that court*, as in the case where the suit is one in which the jurisdiction of the court of first instance depended entirely upon adverse citizenship. Judicial Code, Secs. 128, 240; *American Construction Co., v. Jacksonville Co.*, 148 U. S. 372; *Forsyth v. Hammond*, 166 U. S. 506. We think this is such a suit.”

In the present case the opinion of Judge Hough in the Circuit Court of Appeals laid stress upon the fact that the appeal presented a clear-cut question of law upon undisputed facts, which would permit of an opinion without danger of even seeming to trench upon the exercise of discretion.

In view of the opinion rendered, a trial of the issues upon the facts as found by the Court in the order appealed from would have been only perfunctory, as would have been an appeal to the Circuit Court of Appeals from the decree entered on such trial. Hence the record now before this Court presents a state of facts, which renders the case ripe for a final and conclusive determination.

II.

In the present case there has arisen a decided conflict of opinion with respect to the main question involved among the judges who have had occasion to pass upon it.

In the court below, Judge Hand recognized the importance and novelty of the controlling proposition, and doubted the advisability of granting a preliminary injunction. He said (Record, p. 318):

"While I am personally satisfied after giving the matter most deliberate and careful consideration that the right exists to prevent the sale by a competing news agency of news which is taken from early publications of complainant's members before sufficient time has elapsed to afford opportunity for general publication, and that the existing practice amounts to unfair trade, yet the matter is one of first impression and my decision cannot be regarded as sufficiently free from doubt to justify the granting of a preliminary injunction upon this branch of the case."

Although the majority of the Circuit Court of Appeals reached a contrary conclusion, his Honor the Presiding Judge dissented and was of the opinion that the injunction, in so far as it had been denied in the District Court, should have been denied on the merits.

The fact that there has been such conflict in a case involving a legal proposition of such novelty and general importance as that presented by the record now before the Court, is a sufficient reason under the precedents for the granting of a writ of certiorari.

Cortelyou v. Johnson, 207 U. S. 196.

Continental Paper Bag Co. v. Eastern Paper Bag Co., 210 U. S. 405.

Kokomo Fence Machine Co. v. Kitselman,
189 U. S. 8.

Leeds &c. Co. v. Victor Talking Machine Co., 213 U. S. 325.

Rumford Chemical Works v. Hygiene Chemical Co., 215 U. S. 156.

The foregoing decisions were all rendered in patent cases. A similar practice has prevailed in cases involving the alleged unfair use of trade-names.

Donnell v. Herring-Hall-Marvin Safe Co.,
208 U. S. 267.

Herring &c. Safe Co. v. Hall Safe Co., 208
U. S. 554.

III.

The case involving, as it conceded-ly does, a novel and important commercial question of great public interest, as to which there has been diversity of opinion in the Federal Courts, it should be authoritatively determined by a decision of this Court.

This Court has frequently granted writs of certiorari in actions involving novel questions of commercial and corporation law of general interest, as, for example, the construction of policies of fire, life and marine insurance, bills of lading, charter parties, employees' indemnity bonds, and

the like, of which the following afford illustrations:

The Majestic, 166 U. S. 375.

Hartford Ins. Co. v. Chicago, &c. Ry. Co.,
175 U. S. 91.

*Canada Sugar Refining Co. v. Insurance Co.
of North America*, 175 U. S. 609.

Roehm v. Horst, 178 U. S. 1.

Mutual Life Ins. Co. v. Sears, 178 U. S. 345.

*Washburn & Moen Mfg. Co. v. Reliance
Marine Ins. Co.*, 179 U. S. 1.

The Queen of the Pacific, 180 U. S. 49.

McMaster v. N. Y. Life Ins. Co., 183 U. S.
25.

The Kensington, 183 U. S. 263.

*Guarantee Co. of North America v. Me-
chanics Sav. Bk.*, 183 U. S. 402.

Sun Pr. & Pub. Assn. v. Moore, 183 U. S.
642.

Fidelity &c. Co. v. Courtney, 186 U. S. 342.

Mencke v. Cargo of Java Sugar, 187 U. S.
248.

Old Dominion Copper Co. v. Lewisohn, 201
U. S. 206.

Penman v. St. Paul F. & M. Ins. Co., 216
U. S. 311.

In *Board of Trade v. Christie Grain & Stock Co.*
and *L. A. Kinsey Co. v. Board of Trade*, 198 U. S.
236, which related to market quotations, and are
hereafter considered writs of certiorari were
likewise granted.

IV.

Assuming that the respondent has a right of property in the news which it collects against the surreptitious appropriation of which it is entitled to protection before publication (to which the petitioner agrees), the publication of such news, with its consent, by some of its members, in their newspapers or upon bulletin boards, constitutes a dedication of it to the public, in the absence of a copyright, and its subsequent use by the public generally is lawful.

Taking the view most favorable to the respondent the news collected by it until publication by one of its members, was subject to its control. It could have withheld it from the public had it so chosen. It could have prohibited its members from communicating it to any other person. As between it and its members, it could regard the news until the time for its publication arrived, as charged with a trust.

When, however, with its sanction and express approval, a portion of its members communicate that news to the general public by posting it upon a bulletin board so that all might read it, or by issuing it in their newspapers distributed indiscriminately in millions of copies throughout the country, the respondent could no longer control the use to be made of the news thus unleashed from the bonds of secrecy. When it thus reached the light of day it became the common possession of all to whom it was accessible. The purchaser of a news-

paper containing it could communicate the intelligence which it embodied to anybody, either by handing over the newspaper to be read, or by oral statement of its contents, or by telephoning or telegraphing them. He had the absolute right to read the contents of the newspaper to the worshippers in a church, to an audience in a public hall, or to the attendants at a public meeting, however numerous. No limitation upon the use to be made of the news, by contract or otherwise, was imposed upon the purchaser of the newspaper, or the reader of a bulletin board upon which it was displayed. In the case of newspapers carrying respondent's news, published in the City of New York, the readers run into the millions and include citizens of every State, every one of whom can transmit it to his own community, located though it may be in the remotest corner of the land.

By this permitted publication the news thus ceased to be the property of the respondent, and became the possession of the entire public. This was not an accidental consequence, but was necessarily contemplated, because it was intended that the purpose for which the news was acquired should be accomplished, namely, that it should be published. Exclusive ownership by the respondent, therefore, could not possibly survive its publication in regular course by one to whom the news had been communicated by it for that very purpose.

The claim now for the first time advanced by the respondent in the notice above quoted that all the local news contained in the publications of its 950 member newspapers which has been collected, paid for and published by them in their re-

spective papers remains the exclusive property of the respondent after publication by the publishing member, extends the contention into a field never before attempted or suggested by the Courts so far as we have been able to ascertain. By this construction (to which the petitioner does not agree) each one of the 950 newspapers, none of which are parties to the suit, secures in effect an injunction against the use of its news by the petitioner, without a hearing to the petitioner and regardless of the defenses that the latter may have a complete defense against individual members.

Although news of the ephemeral character peculiar to information concerning passing events is not the subject of copyright (*Tribune Co. of Chicago v. Associated Press*, 116 Fed. Rep. 126; *New York Times Co. v. Sun Printing & Publishing Assn.*, 204 Fed. Rep. 586; *Tribune Co. v. Illinois Printing & Publishing Co.*, 76 Publishers Weekly, 643, 947; *Walter v. Steinkopff*, L. R. 3 Ch. Div. 489), there has not even been an attempt on the part of the respondent to copyright its news, nor is it pretended that the decree which it has obtained in this case is grounded on any statutory right, either of copyright or otherwise.

The respondent must therefore stand or fall on a common law right. Thus regarded, it is certainly not understating the respondent's case to say that its position is not more favorable than is that of the creator of a work of literary and artistic merit,—that of a poet, a historian, an essayist, or a novelist, whose intellectual product unquestionably possess all of the attributes of property. Yet it is a well settled principle of the common law that, in the absence of a copyright derived from a legislative enactment, the publica-

tion of such a work amounts to a dedication of it to the public, and confers a universal right of reproduction and use whether for purposes of gain or otherwise. Copyright property is wholly statutory.

American Tobacco Co. vs. Werckmeister,
207 U. S. 284.

White-Smith Music Co. vs. Apollo Co., 209
U. S. 1.

Bobbs-Merrill Co. vs. Straus, 210 U. S. 346.

As long ago as in 1774 the House of Lords in *Donaldson v. Beckett*, 4 Burr, 2408, Note; 2 Bor. P. C. 129, held that there could be no copyright or ownership in news at common law after publication. To the same effect are the newspaper cases cited (*supra*).

Particular attention is called to the first of them, *Tribune Co. of Chicago v. Associated Press*, 116 Fed. Rep. 126, the defendant's predecessor there (which was then a voluntary association and as such was ousted from the State of Illinois (*Inter-Ocean Pub. Co. v. Asso. Press*, 56 N. E. 822) and simultaneously reorganized as a corporation under its present Charter in New York State) being the respondent here.

It there appeared that the Chicago Tribune, by agreement, secured the right to use such parts of the special war dispatches of the London Times and its editorial comments thereon, as the Tribune might select and telegraph to America, and the Times abandoned in favor of the Tribune "any copyright in those telegrams so far as publication in Amerca is concerned." The selections were made and cabled from the Times office, and were published in the Tribune on the

same morning as in the Times, though some hours later. The Associated Press, doing the very thing for which it now denounces the petitioner and which it then defended as virtuous "selected" (as it euphemistically described its act, which, when done by the petitioner it calls "pirated") the news thus obtained by the Tribune and distributed it among its members, and then proceeded to defend its action successfully. The court very properly held that no copyright had been acquired under the statute by the Tribune, and as to its claim of common law rights said:

"Literary property is protected at common law to the extent only of possession and use of the manuscript and its first publication by the owner,—a right well exemplified in *Publishing Co. v. Monroe*, 73 Fed. Rep. 196. With voluntary publication the exclusive right is determined at common law, and the statutory copyright is the sole dependence of the author or owner for a monopoly in the future publication. Unless the United States statute is applicable to protect the Tribune's publications in question, it is clear that the motion for an injunction must fail. * * * As the exclusive right of publication at common law terminates with the publication in London, no protection then exists beyond that expressly given by the statute. Before the amendment authorizing copyright in America on foreign publications, under prescribed conditions where the publication is simultaneous, such foreign property right was left unprotected."

In *Drone on Copyright*, pp. 169, 170, the author after indicating that under certain conditions news matter might be copyrighted, added:

"If any uncopyrighted composition be published in an uncopyrighted newspaper or

periodical, it becomes common property and may be republished by any one."

In *Bowker on Copyright*, the author says, at pp. 88, 89:

"In respect to news there is no provision in the new code. A bill to protect news for twenty-four hours was at one time before Congress, but was never passed. There is, therefore, no copyrighted protection for news as such, but the general copyright of the newspaper or a special copyright may protect the form of a dispatch, letter, or articles containing news. Thus the *New York Herald* copyrighted without question Dr. Cook's Arctic dispatches, and the question as to the copyright by the *New York Times* of Commander Peary's dispatch describing his dash to the Pole hinged solely on the question of ownership or authority to copyright, as set forth in a later chapter. But any such copyright could not prevent publication by other newspapers of the news that Cook and Peary claimed to have reached the North Pole at stated dates and under stated circumstances, though their own form of statement of the facts could not lawfully be copied except within 'fair use.' "

It is significant that in the present case the respondent has thus far succeeded in procuring by judicial decree rights which Congress in the exercise of its legislative power deemed it wise to withhold.

In *Wheaton v. Peters*, 33 U. S. 591, Mr. Justice McLean said (p. 657):

"That an author, at common law, has a property in his manuscript, and may obtain redress against any one who deprives him of it, or by improperly obtaining a copy en-

deavors to realize a profit by its publication, cannot be doubted; but this is a very different right from that which asserts a perpetual and exclusive property in the future publication of the work, after the author shall have published it to the world. The argument that a literary man is as much entitled to the product of his labor as any other member of society, cannot be controverted. And the answer is, that he realizes this product by the transfer of his manuscripts, or in the sale of his works when first published. A book is valuable on account of the matter it contains, the ideas it communicates, the instruction or entertainment it affords. Does the author hold a perpetual property in these? Is there an implied contract by every purchaser of his books, that he may realize whatever instruction or entertainment which the reading of it shall give, but shall not write out or print its contents?

In what respect does the right of an author differ from that of an individual who has invented a most useful and valuable machine? In the production of this, his mind has been as intensely engaged, as long, and, perhaps, as usefully to the public, as any distinguished author in the composition of his book. The result of their labors may be equally beneficial to society, and in their respective spheres they may be alike distinguished for mental vigor. Does the common law give a perpetual right to the author, and withhold it from the inventor? And yet it has never been pretended that the latter could hold, by the common law, any property in his invention after he shall have sold it publicly. It would seem, therefore, that the existence of a principle may well be doubted, which operates so unequally. This is not a characteristic of the common law. It is said to be founded on principles of justice, and that all its

rules must conform to sound reason. Does not the man who imitates the machine profit as much by the labor of another as he who imitates or republishes a book? Can there be a difference between the types and press with which one is formed, and the instruments used in the construction of the others? That every man is entitled to the fruits of his own labor, must be admitted; but he can enjoy them only, except by statutory provision, under the rules of property which regulate society and which define the rights of things in general."

The doctrines of this case received careful consideration and were practically adopted in *Jefferys v. Boosey*, 4 H. L. Cas., 815, 962, 965, 967, which involved the right to Bellini's opera *La Sonnambula*. There Lord Brougham said:

"The right of the author before publication we may take to be unquestioned, and we may even assume that it never was, when accurately defined, denied. He has the undisputed right to his manuscript; he may withhold, or he may communicate it, and, communicating, he may limit the number of persons to whom it is imparted, and impose such restrictions as he pleased upon their use of it. The fulfilment of the annexed conditions he may proceed to enforce, and for their breach he may claim compensation. But if he makes his composition public, can he retain the exclusive right which he had before, is he entitled to prevent all from using his manuscript by multiplying copies, and to confine this use of it to those whom he specially allows so to do? Has he such a property in his composition as extends universally and enures perpetually, the property continuing in him wheresoever and whensoever that composition may be found to exist? In other words,

can his thoughts, or the results of his mental labor, or the produce of his genius, be considered as something fixed and defined, which belongs to him exclusively at all times and in all places?

First, let us observe that this question cannot be confined to the form, whether written or printed, which that composition takes, or in which these thoughts are conveyed. If it is clear that before publication the author has the right, and may proceed against those to whom he imparts his manuscript under conditions, it is equally clear that if he had communicated his composition to them verbally under such conditions, he could have complained of a breach. The question is personal between him and them. But if instead of orally delivering his composition to a select number, he delivered it to all who came and heard him, imposing no restriction, he could not complain with effect of any one repeating it to others who had not been present. Now, there seems no possibility of holding that he can prevent the persons to whom he gave or sold his paper, whether written or printed, from making their own use of it, without also holding that he could proceed against his auditors unwarned. If each of these might repeat what he had heard, each of those might lend the paper or book, and could only be tied up from so doing by express stipulation, imposing restrictions upon him when he received it. So, if he could lend it, he could copy it and give or sell his copy unless so tied up. *

* * *

There is nothing in the thought of the person resembling the substance to which the incorporated hereditament is related. They are of too unsubstantial, too evanescent a nature, their expression of language, in whatever manner, is too fleeting, to be the subject of proprietary rights. *Volat irrevocabile verbum*, whether borne on the wings of the

wind or the press, and the supposed owner instantly loses all control over them. When the period is demanded at which the property vests, we are generally referred to the moment of publication. But that is the moment when the hold of the proprietor ceases. He has produced the thought and given it utterance, and *eo instanti*, it escapes his grasp.

Thus, whatever may have been the original right of the author, the publication appears to be of necessity an abandonment; as long as he kept the composition to himself, or to a select few placed under conditions, he was like the owner of a private road; none but himself or those he permitted could use it; but when he made the work public he resembled that owner after he had abandoned it, who could not directly prohibit passengers, or exact from them a consideration for the use of it."

Further on the opinion continues:—

"It is said that literary and scientific men are left without protection, and that the invaluable produce of their labours is unduly estimated by the common law, if the right in question be not recognized. But the negation of that right only implies that we refuse to acknowledge a property in things by their nature incapable of being held in severalty, and that we recoil from adopting a position which involves contradiction. The contradiction is, that one can retain that which he parts with, and can dedicate to the public, or at least do an act which necessarily involves such dedication, and yet keep exclusive possession of the thing dedicated and retain all the rights he had before the dedication."

In *Holmes v. Hurst*, 174 U. S. 85, which related to the copyright of "The Autocrat of the Breakfast Table" as published in the Atlantic Monthly,

Mr. Justice Brown, after citing *Donaldson v. Becket*, *Wheaton v. Peters* and also *Jefferys v. Boosey*, *supra*, said:

"While the propriety of these decisions has been the subject of a good deal of controversy among legal writers, it seems now to be considered the settled law of this country and England that the right of an author to a monopoly of his publications is measured and determined by the copyright act—in other words, that while a right did exist by common law, it has been superseded by statute."

The opinion also contains the following significant statement:

"If an author permit his intellectual production to be published either serially or collectively, his right to a copyright is lost as effectually as the right of an inventor to a patent upon an invention which he deliberately abandoned to the public—and this, too, irrespective of his actual intention not to make such abandonment."

These principles received application in *Jewelers' Mer. Agency v. Jewelers' Pub. Co.*, 155 N. Y. 241, where the plaintiff collected information as to the business and credit of persons in the jewelry trade and printed such information twice a year in a reference book which it furnished to such persons as subscribed therefor, under a contract which designated the transaction as a "loan" of the volumes and provided that the information supplied should be confidential and should not be disclosed, and that title to the book should remain in the agency, which might be terminated on returning the amount of the unexpired subscription. The defendant appropriated

from the plaintiff's reference book material information and used it in a competing publication. There was an ineffectual attempt to secure a copyright. The action was brought to restrain the defendant on common law grounds. Relief was denied, the Court saying:—

“But publication also operates to destroy the common law rights, whether a copyright be secured or not. An invention, a painting or a book is the property of its creator. He may keep it for his own exclusive use or enjoyment if he sees fit. The public has no greater right to it, however useful it may be, than it would have to any other part of his personal property. But if he once publishes it, his property right in it is gone and everyone may make use of it. * * *

Out of a few cases of the same general character seems to have grown the idea that it is possible for a man by putting restrictions on the use of his books by subscribers, however numerous they may be, to retain in himself forever the common law right of first publication. If that position be sustained by the judgment of the courts, then will have been obtained judicial legislation of far broader scope and much greater value to authors and others than that offered by the copyright statute. * * *

If the plaintiff's interests are of so important a character, and the public interests would be best subserved were the law such as plaintiff insists it to be, then is presented a proper subject for legislative action. But our examination leads us to the conclusion that the present state of the law is that if a book be put within reach of the general public, so that all may have access to it, no matter what limitations be put upon the use of it by the individual subscriber or lessee, it is published, and what is known as the common law copyright, or right of first publication, is gone.”

In this connection the decisions in *Bobbs-Merrill Co., vs. Straus*, 210 U. S. 339 and *Bauer vs. O'Donnell*, 229 U. S. 1, suggest interesting analogies.

It necessarily follows, that if with the respondent's consent the news which the petitioner is claimed to have copied had been printed in the form of an uncopyrighted book, the petitioner could have multiplied copies of it without number and circulated them wherever it desired. How is the situation bettered by the fact that the publication was in a daily newspaper and that the subject-matter of the publication was one of passing interest?

The principle which applies to literary property is equally applicable to any idea, trade secret or business plan which one may conceive or originate. Following the decision in *Peabody v. Norfolk*, 98 Mass. 452, Judge Landon said in *Bristol v. Equitable Life Assurance Society*, 132 N. Y. 264:

"Without denying that there may be property in an idea, or trade secret or system, it is obvious that its originator or proprietor must himself protect it from escape or disclosure. If it cannot be sold or negotiated or used without a disclosure, it would seem proper that some contract should guard or regulate the disclosure, otherwise it must follow the law of ideas and become the acquisition of whoever receives it."

In that case the plaintiff alleged that in order to induce the defendant to employ him, he communicated to it in confidence a new system of soliciting business, and that the defendant, without plaintiff's knowledge, commenced the use of the system and continued it against his protest and

derived large profits, for which he sought an accounting. It was decided that no cause of action was set forth, the Court saying:

“The allegation of the complaint that the plaintiff disclosed the system in confidence to the defendant is vague. It does not necessarily mean that the defendant agreed not to use it; it may mean something else. Defendant is at liberty to conduct its business in its own way; it obtained a valuable hint from the plaintiff and assumed no legal obligation to pay the plaintiff if it should conclude to act upon it.”

In *Westcott Chuck Co. v. Oneida National Chuck Co.*, 199 N. Y. 247, it was held that when a patent has expired the right to make the patented article passes to the public. Said Chief Judge Cullen:

“Its [the inventor’s] situation was at least no better than if it had never obtained patents, and in such a case, as stated by Judge Vann in *Tabor v. Hoffman* (118 N. Y. 30): ‘As the plaintiff had placed the perfected pump upon the market, without obtaining the protection of the patent laws, he thereby published that invention to the world and no longer had any exclusive property therein.’ * * * In *Cooke & Cobb Co. v. Miller* (169 N. Y. 475) it was said: ‘In the absence of some restriction upon the defendants arising out of the patent law, * * * the defendants had the right to manufacture and sell the article in question, although it was similar in general appearance and made from the same material and upon the same plan as the article made and sold by the plaintiff.’ The evidence tends to show that the details of plaintiff’s tool which the defendant copied were features or elements of the tool itself

and therefore within the defendant's right to reproduce."

In the present case the petitioner occupied no contractual or fiduciary relation toward the respondent. It did not receive the information which was heralded on the bulletin boards and flaunted in the newspapers and published by the respondent's authority, confidentially or under the seal of secrecy. Whatever information it obtained it secured in common with others,—openly, publicly and notoriously. The newspapers which first published or bulletined the news furnished them by the respondent, committed no breach of contract, but acted in strict conformity with their express or implied agreement. Nor can there be any pretence that the petitioner wrongfully procured any member of The Associated Press to publish the news supplied by the latter in violation of the terms of the contract between such member and the respondent.

It is significant that the by-laws of the respondent place no limitations upon the use to be made of the news furnished by it to its members, except those contained in Articles VII and VIII, and which show that the issuance of the newspapers of the several members is referred to as "the publication of the news of the Associated Press". They read as follows:

ARTICLE VII.

SEC. 4. The news service of this Corporation shall be furnished only to members thereof, or to the newspapers represented by them and specified in their certificates of membership.

SEC. 5. A member shall *publish the news of The Associated Press* only in the newspaper, the language and the place specified in his certificate of membership and he shall not permit any other use to be made of the news furnished by the Corporation to him or to the newspaper which he represents.

SEC. 6. The time limits for the receipt and publication of news by members shall be (standard time in all cases at the place of publication) as follows: Morning papers to receive not later than 9 a.m. and to publish not earlier than 9 p.m., except that for editions to be circulated only outside of the city of publication not earlier than the following morning, morning papers may publish not earlier than 5 p.m. and that Sunday editions so published may be circulated in the city of publication after 9 p.m. Saturday; afternoon papers to receive not later than 6 p.m. and to publish not earlier than 9 a.m. The service to afternoon papers between 4 p.m. and 6 p.m. to be of bulletin character; provided, that the Board of Directors may authorize that upon extraordinary occasions The Associated Press dispatches may be used in extra editions or for bulletins outside of the hours named.

SEC. 8. No news furnished to the Corporation by a member shall be supplied by the Corporation to any other member publishing a newspaper within the district which the Board of Directors shall have described in defining the obligations of such member to furnish news to the Corporation."

"ARTICLE VIII.

Sec. 6. No member shall furnish, or permit any one in his employ or connected with the newspaper specified in his certificate of membership to furnish, to any person who is not a member, the news of the Corporation in advance of publication, or to another member

any news received from the Corporation which the Corporation is itself debarred from furnishing to such member, nor conduct his business in such a manner that the news furnished by the Corporation may be communicated to any person, firm, corporation or association not entitled to receive the same.

Sec. 7. No member shall furnish, or permit any one to furnish, to any one not a member of this Corporation, the news which he is required by the By-laws to supply to this Corporation" (*Rec. p. 173*).

It further appears (*Rec. pp. 173, 174*), that on April 21, 1913, the Board of Directors of the respondent adopted a resolution that the public display of news upon bulletin boards at the main or branch offices of a newspaper in its own territory, does not constitute a violation of the by-laws which provide that no member shall furnish the news of The Associated Press in advance of publication to any person who is not a member of the Associated Press.

If any proof were necessary with respect to so obvious a proposition, the quotations which have just been made demonstrate that there is no provision in the charter or by-laws of the respondent that news gathered by it shall remain confidential and secret until its publication has been fully accomplished by all of the members of the corporation. Such a provision would be preposterous on its face and devoid of all force.

But even if there had been such a provision, it could not possibly have bound the public, for it was not a party to any such agreement. It did not receive the news as a confidential communication. Nor was the news when communicated subject to any limitation affecting the use to be

made of it. When the bottle which contained it was uncorked, it was like the Genie of the Arabian fable, it pervaded the entire atmosphere and could not be bottled up again.

It is, however, urged that, because the petitioner is seeking to make use of the news thus published with the respondent's consent, for its own profit and in competition with the respondent, a legal wrong has been inflicted against which a court of equity will grant redress.

Assuming, but not conceding, that the respondent, which is not organized for profit, has sustained damage, where is the *injuria* to be found? What principle of law has been violated? What property right has been infringed, when the petitioner has only taken that which it was the right of anybody and everybody to take who had access to the newspaper or to the bulletin board by which the news which the respondent calls its own, was heralded broadcast? Where is the precedent for such a cause of action? It is not to be found in the case of the inventor, or the architect, or the artist, who originates ideas which, in the absence of statutory protection, may be imitated, copied or appropriated, by whosoever pleases, to enjoy pecuniary or other profit from the use to be made of their creation.

While it is true that the fact that no precedent can be found to sustain an action in any given case, is cogent evidence that a principle does not exist upon which the right may be based, the want of a precedent is not necessarily a sufficient reason for turning a plaintiff out of court; yet as was said by Chief Judge Parker in *Roberson v. Rochester Folding Box Co.*, 171 N. Y. 538, there must nevertheless

"be found a clear and unequivocal principle of the common law which either directly or mediately governs it or which by analogy or parity of reasoning ought to govern it."

Such a principle, it is asserted by the petitioner, is to be found in the formula contained in the opinion of Judge Hough rendered in the Circuit Court of Appeals in this case that

"it is reasonable and just that each member of plaintiff and plaintiff itself has a property right in this news until the reasonable reward of each member is received, and that means (with due allowance for the earth's rotation) until plaintiff's most western member has enjoyed his reward, which is, not to have his local competitor supplied in time for competition with what he has paid for."

That is rather the statement of a conclusion than of a reason. It is the more extraordinary in that it confounds the corporation and its members. The Associated Press brings this action and not its members. Their relation to the corporation is practically the same as that of a stockholder in a business corporation. The individual interests of such a stockholder cannot be enforced in an action brought by the corporation. The corporate entity can only enforce a cause of action which pertains to the entity as such, and not one based on considerations which are applicable to the individual stockholders or members. Nor can the latter maintain an action based upon rights accruing to the corporation, save in exceptional cases which are adequately safeguarded by the authorities.

United Copper Securities Co. v. Amalgamated Copper Co., 244 U. S. 261.

But considering the formula enunciated in the opinion of Judge Hough more closely, it will be found that it loses sight of the principles which we have discussed and in which the nature of the respondent's property right and its limitations are considered. Not oblivious to those authorities the Court is driven to the criticism that the petitioner lays improper stress upon the fact of publication and that there can be no publication of the news collected by the respondent until each of its 950 members has been enabled, if he so chooses, to publish it in a newspaper owned or controlled by him; and in like manner, the news printed in each of the 950 newspapers, and originating with them, cannot be said to have been published until an opportunity has been afforded to each of the 950 co-operating newspapers to publish such news of local origin.

This is certainly a startling proposition, which, if adopted, would result in the most grotesque consequences and disturb well settled legal principles. The connotation of "publication" announced in the opinion, varies materially from that which was given to it at the instance of the respondent in *Tribune Co. of Chicago v. Associated Press*, *supra*.

The lexicographers define "publication" as the act by which a thing is made public, or is given publicity.

LeRoy vs. Jameson, 15 Fed. Cas. 373, 376.

United States vs. Williams, 3 Fed. Rep. 484, 486.

United States vs. Comerford, 25 Fed. Rep. 902, 903.

D'Ole vs. Kansas City Star Co., 94 Fed. Rep. 840, 842.

Hale vs. Grey, 21 Nev. 278; s. c. 19 L. R. A.
134.

Sproul vs. Pillsbury, 72 Me. 20, 21.

Review of Authorities Relied on by Respondent.

We assert with much confidence, that there is nothing in any of the authorities upon which the courts below and the respondent relied which will sustain the reasoning on which their conclusion rests; but, on the contrary, practically every one of the cases to which reference was made strengthens the petitioner's contention.

Caird v. Sime, L. R. 12 App. Cas. 326.

There it was held that a professor who delivers lectures in his classroom does not dedicate them to the world so as to entitle any one to publish them without his permission. Lord Halsbury regarded such a delivery as not equivalent to a communication of them to the public at large, since it was only "to a limited class of students." His opinion, however, contains this significant remark:

"If by it [the word 'lecture'] is signified a lecture delivered on behalf of the University, and, so to speak, as the lecture of the University itself, as the authorized exposition of the University teaching, I can well understand that by the nature of the thing, from the circumstances of its delivery, and the object with which it was delivered, it would be impossible to say that it was intended by those on whose behalf the professor was lecturing or by himself to limit the right of communication to others. Whether that limitation of the right arises from the implied contract or from the existing relation between the hearers and the author, it is intelligible that where a person

speaks a speech to which all the world is invited, either expressly or impliedly to listen, or preaches a sermon in a church, the doors of which are thrown open to all mankind, the mode and manner of publication negative, as it appears to me, any limitation."

Lord Watson said (pp. 343, 344) :

"The author of a lecture on moral philosophy, or of any other original composition, retains a right of property in his work which entitles him to prevent its publication by others until it has, with his consent, been communicated to the public. Since the case of *Jefferys v. Boosey*, 4 H. L. C. 815, was decided by this House in the year 1854, it must be taken as settled law that, upon such communication being made to the public, whether orally or by the circulation of written or printed copies of the work, the author's right of property ceases to exist. Copyright, which is the exclusive privilege of multiplying copies after publication, is the creature of statute, and with that right we have nothing to do in the present case. The only question which we have to decide is, whether the oral delivery of the appellant's lectures to the students attending his class is, in law, equivalent to communication to the public.

The author's right of property in his unpublished work being undoubted, it has also been settled that he may communicate it to others under such limitations as will not interfere with the continuance of the right. *

* * *On the other hand I do not doubt that a lecturer who addresses himself to the public generally without distinction of persons or selection or restriction of his hearers has, as the Lord President observes in this case, 'abandoned his ideas and words to the use of the public at large, or in other words has himself published them'."*

Lord FitzGerald went much further and was of the opinion that the delivery of a lecture to a class of students was a publication to the public at large.

Tompkins v. Halleck, 133 Mass. 32.

There a play which had never been printed was presented on the stage. A spectator who attended a public representation and who wrote down the play from memory and then sought to present it himself, was restrained from staging it. The Court expressly limited its decision to the rights of "the proprietors of *unpublished* plays." Mr. Justice Devens said:

"That the right of property which an author has in his works continues until by *publication* a right to their use has been conferred upon or dedicated to the public, has never been disputed. *If such publication be made in print of a work of which no copyright has been obtained, it is a complete dedication thereof for all purposes to the public.* Wheaton v. Peters, 8 Pet. 591, Stevens v. Gladding, 17 How. 447."

Palmer v. DeWitt, 47 N. Y. 532, involved a similar question and a like result was reached. But in the course of his opinion Judge Allen said:

"The author of a literary work of composition has, by law, a right to the first publication of it. He has a right to determine whether it shall be published at all, and if published, when, where, by whom, and in what form. This exclusive right is confined to the first publication. *When once published it is dedicated to the public*, and the author has not, at common law, any exclusive right to multiply copies of it or to control the subsequent issues of copies by others. * * *

Until published, the work is the private property of the author, wherever the common law rights of authors are regarded. When once published, with the assent of the author, it becomes the property of the world, subject only to such rights as the author may have secured under copyright laws, and they can have no force or give any rights beyond the territorial limits of the government by which they are enacted."

*Dodge Co. v. Construction Information Co.,
183 Mass. 62.*

There the plaintiff furnished its subscribers daily, either orally, in writing, or in print, information in regard to the erection of buildings and the construction of public works, under contracts signed by each subscriber to use the reports in strict confidence and for his business only. The defendant sought to make use of information which it surreptitiously and unlawfully acquired from plaintiff's subscribers. An action was sustained, but solely on the ground of the unlawful methods pursued by the defendant. Chief Justice Knowlton said:

"The plaintiff has it [the information] and the defendant does not have it. If the defendant can obtain it legitimately, he becomes the owner of the same kind of property, and the two may become competitors in the market as vendors to those who are willing to pay for it. But if the defendant surreptitiously and against the plaintiff's will takes from the plaintiff and appropriates the form of expression which is the symbol of the plaintiff's possession, and thus, by direct attack, as it were, divides the plaintiff's possession, and shares it, this conduct is a violation of the plaintiff's right of property. * * *

The next question is whether the giving of information by the plaintiff to its subscribers is a publication of it, such as dedicates it to the public and deprives the plaintiff of its right of control. It is well established that the *private* circulation of information or literary composition, in writing or in print, for a restricted purpose, is not a publication which gives the public a right to use it."

Jewelers' Mercantile Agency v. Jewelers' Publishing Co., *supra*, was cited and distinguished on obvious grounds.

Ferris v. Froham, 223 U. S. 424.

This case likewise related to the public representation of a dramatic composition not printed and published, which was held not to constitute an abandonment of it to the public use. Emphasis was, however, given to the fact that the play had not been printed and published.

Werckmeister v. American Lithographic Co., 134 Fed. Rep. 321.

That was an action to restrain the infringement of a copyright on Sadler's painting entitled "The Chorus". The defendant pleaded an exhibition of the painting at the Royal Academy at London as a publication thereof. It appeared that the exhibition, except as to members of the Academy and the exhibitors and their families, was on the conditions of the payment of an entrance fee and that no permission to copy works during the exhibition could be granted. The decision was based on the principle laid down in *Caird v. Sime*, *Tompkins v. Halleck* and *Palmer v. DeWitt*, *supra*, Judge Townsend saying:

"A limited publication of a subject of copyright is one which communicates a knowledge of its contents under conditions expressly or impliedly precluding its dedication to the public. * * * The nature of the property in question in large measure determines the extent of the public right. Thus, in case of a book, ordinarily the sole practical benefit to the author is in the right to multiply copies. The exhibition or private circulation of the original or of printed copies is not a publication, unless it amounts to a general offer to the public. The unrestricted offer of even a single copy to the public implies the surrender of the common law right. * * *

In the case at bar not only was there no presumption of a right to copy, but there was an express denial of such right. *Whether said exhibition would have amounted to a publication in the absence of any such prohibition is immaterial to the disposition of this case, and upon that question we express no opinion.*"

When the case came before this Court, *sub nom. American Tobacco Co. v. Werckmeister*, 207 U. S. 284, Mr. Justice Day said:

"In this case it appears that paintings are expressly entered at the gallery with copyrights reserved. There is no permission to copy; on the other hand, officers are present who rigidly enforce the requirements of the society that no copying shall take place.

Starting with the presumption that it is the author's right to withhold his property, or only to yield to a qualified and special inspection which shall not permit the public to acquire rights in it, we think the circumstances of this exhibition conclusively show that it was the purpose of the owner, entirely consistent with the acts done, not to permit such an inspection of his picture as would throw its use open to the public. *We do not*

mean to say that the public exhibition of a painting or statue, where all might see and freely copy it, might not amount to publication within the statute, regardless of the artist's purpose or notice of reservation of rights which he takes no measure to protect. But such is not the present case, where the greatest care was taken to prevent copying."

Exchange Telegraph Co., Ltd. v. Gregory & Co., L. R. (1896) 1 Q. B. 147.

There the plaintiff was a telegraphic news agency, which collated stock quotations and distributed them to subscribers under a contract that the intelligence furnished by the company should not be sold or communicated to non-subscribers, for a pecuniary consideration or otherwise. The defendant, who knew the terms of the contract, wrongfully induced one of the plaintiff's subscribers to break its contract and thus surreptitiously acquired the plaintiff's quotations and published them, to the plaintiff's injury. In that case there was no publication by the plaintiff, the quotations were supplied under conditions of trust and confidence, and the defendant committed a tort in wrongfully inducing the subscriber to commit a breach of his contract.

Exchange Telegraph Co. v. Central News Co., Ltd., L. R. (1897) 2 Ch. 48.

There the plaintiff collected news regarding horse races, which it distributed among its subscribers on the condition that it was to be used only in the newspaper, or posted only in the club, news room, office, or other place at which it was delivered, and that no copy of it should be

made for any other purpose than for such publication, and was not to be communicated to any other person, nor assigned in whole or in part to another. It was held that the court would interfere by injunction to restrain a subscriber from communicating such information to a third party in breach of such contract and to restrain the third party from inducing the subscriber to break his contract by supplying him with such information with a view to publication. In the course of his opinion Mr. Justice Stirling said:

"It was said, however, in the present case, that all persons who received information through the plaintiff's machine were not, or might not be, under an obligation to abstain from publishing it. It was pointed out that the news was supplied by the plaintiff to clubs, news rooms, and hotels for the purpose of being posted up there, and it was said that messages received at Panton Street (that being the defendant's office) might have come from some person who had lawfully acquired it at some such place and was at liberty to use it as he saw fit. I think it possible that such persons might exist, but I also think that on the evidence before me I ought not to come to the conclusion that such a person sent these messages to Panton Street."

Kiernan v. Manhattan Quotation Telegraph Co., 50 How. Pr. 194.

There The Associated Press turned over to the plaintiff foreign financial news collected by it. The plaintiff furnished the news to his subscribers and made no general publication. The defendant obtained all its financial news through one Abbot, who copied it from the manifold slips furnished by the plaintiff to his customers. It was held that

the transmission of the quotations to subscribers over telegraphic printing instruments was not a general publication. Mr. Justice Van Brunt said:

"To say that the Associated Press could not restrain the publication of its dispatches by any person who should surreptitiously obtain them would be to hold that no private individual could prevent the publication of his own private dispatches if they should happen to relate to public events. It seems to me clear, therefore, that there is a right of property which will be protected by the court, in the news collected by the Associated Press abroad and telegraphed to it by its agents, so long as that right is not abandoned by publication; and as Mr. Kiernan has succeeded to the rights of the Associated Press, so far as relates to 'foreign financial news,' he is entitled to protection in the use of that news, *unless he abandons it by publication.* * * * Does the plaintiff abandon such right by transmitting such news to his customers? *If such transmission amounts to a general publication then it is clear that all rights of the plaintiff are lost.*"

After citing *Palmer v. DeWitt*, *supra*, and *Woolsey v. Judd*, 4 Duer, 485, the opinion proceeds:

"Applying this principle to the case now under consideration, it is evident that if Mr. Kiernan transmitted his foreign financial news to his customers, for their information, by means of manifold slips exclusively, *he could restrain the publication by these persons of such intelligence.* Is there any difference in principle because he writes to his customers by telegraph? I am unable to see any distinction."

National Telegraph News Co. v. Western Union Telegraph Co., 119 Fed. Rep. 294.

The appellee gathered information as to current events, such as the results of races, games and market quotations, which it distributed to its customers by tickers, under a contract which is indicated to have been similar to the one set forth in *Illinois Commission Co. v. Cleveland Telegraph Co.*, 119 Fed. Rep. 301, which was decided concurrently. The defendant appropriated the news appearing upon the appellee's ticker tape and circulated the news over its own wires and tickers to its own patrons. It defended its action by the contention that, upon the appearance of the printed tape upon the appellee's tickers in the places of business of the latter's patrons, there was such a publication as amounted to a dedication of the contents of the tape to the public. It was obvious, however, that the information given by the appellee to its patrons, was for a limited use only and was not to be communicated to the public generally, and, under the terms of the contract pursuant to which the news was furnished, was under no circumstances to be communicated to any other news distributing company.

*Board of Trade of Chicago v. Christie Grain
& Stock Co.*, 198 U. S. 236.

There the plaintiff collected quotations of the prices offered and accepted for produce in its exchange, which it distributed to subscribers under a contract which confined the information conveyed within a circle of persons, all contracting with the Board of Trade. The defendant refused to sign a contract of the character required and obtained the quotations in some way not disclosed, but necessarily in a surreptitious manner. It was held that the plaintiff was entitled to an injunc-

tion to restrain the defendant from availing itself of these quotations. The ground of the decision is stated by Mr. Justice Holmes thus:

"In the first place, apart from special objections, the plaintiff's collection of quotations is entitled to the protection of the law. It stands like a trade secret. The plaintiff has the right to keep the work which it has done, or paid for doing, to itself. The fact that others might do similar work, if they might, does not authorize them to steal the plaintiff's. The plaintiff does not lose its rights by communicating the result to persons, even if many, in confidential relations to itself, under a contract not to make it public, and strangers to the trust will be restrained from getting at the knowledge by inducing a breach of trust and using knowledge obtained by such a breach."

The cases relied upon are those which have been discussed *supra*.

Judge Ward, in his dissenting opinion in the present case, makes the following lucid comment, which distinguishes this from the *Christie* case:

"The Supreme Court in the *Christie* case likened property in news to property in trade secrets. The two are strikingly similar. the owner of a trade secret will be given protection against any breach of confidence in respect to it by his employees and against any dishonest discovery of it by third parties. If, however, he communicates the secret to another without condition or if any one by his own efforts, for instance by analysis of a secret compound, learns how it is made, such persons may use it without any accountability to the original discoverer. That the discoverer spent much time and money in discovering the secret would not be regarded as a

reason why such persons learning it honestly should not make use of it.

"In this case the complainant furnishes news to its members for the express purpose of their putting it on their bulletin boards and issuing it to the public in their newspapers. This is what they live on. After this it seems to me pure fiction to say that any property in the distributor survives. Everything in the nature of a confidence about the communication has ceased."

To this might be added what Judge Vann said in *Tabor v. Hoffman*, 118 N. Y. 36:

"If a valuable medicine, not protected by patent, is put upon the market, any one may, if he can by chemical analysis and a series of experiments, or by any other use of the medicine itself aided by his own resources only, discover the ingredients and their proportions. If he thus finds out the secret of the proprietor, he may use it to any extent that he desires without danger of interference by the courts. But, because this discovery may be possible by fair means, it would not justify a discovery by unfair means, such as the bribery of a clerk, who in the course of his employment had aided in compounding the medicine and had thus become familiar with the formula."

Where, however, every element of secrecy is removed by the voluntary act and consent of the possessor of what may originally have been a trade secret, the right to make such use of the information once secret, but which has ceased to be so, must be unlimited. To apply the doctrine relating to trade secrets to news printed in a newspaper of general circulation, is an inconceivable anomaly. Secrecy ends where publicity begins, and in the

present case publicity was unmistakably intended.
Francis v. Campbell, 68 App. Div. 287, illustrates
 the principle for which we contend.

Board of Trade of Chicago v. McDermott
Commission Co., 143 Fed. Rep. 188.

This case is similar to those above enumerated
 and related also to the furnishing of quotations
 for use by patrons, and not for publication. The
 Court there said:

“It is quite apparent that the purpose of
 such posting is for the benefit of those who
 subscribe for and have the lawful right to use
 such quotations, and their patrons, and to in-
 vite further trade, and not for the benefit of
 competitors or the general public.”

Board of Trade v. Tucker, 221 Fed. Rep.
 305.

Board of Trade v. Cella Commission Co.,
 145 Fed. Rep. 28.

Board of Trade v. Kinsey Co., 130 Fed.
 Rep. 507.

All of these cases are governed by the principle
 of the *Christie* case.

V.

**None of the elements constituting
 unfair competition are to be found in
 this case.**

The respondent had no ownership in the facts
 to which the news which it collected may have
 related.

As said by Judge Hough in *Davies v. Bowes*, 209 *Fed. Rep.* 54, 56:

“There can be no piracy of the facts, because facts are public property.”

That idea was likewise expressed by Judge Grosseup in *Tribune Co. v. Illinois Pub. & Pr. Co.*, 76 *Publishers Weekly*, 643, 947.

The petitioner did not in any way sail under false colors. It did not pretend that the news which it distributed was that of the respondent. On the contrary, the complaint proceeds upon the very converse of that theory. Nor did the petitioner resort to any of the methods that have been denounced as constituting unfair competition. Upon the branch of the case to which this application relates it did not induce the breach of competitors contracts, or entice employees from the service of the respondent, or induce them to betray trade secrets or to divulge confidential information. It did not engage in defamation of the respondent, or disparagement of the news collected by it. It made no misrepresentations or false claims. It did not resort to intimidation of the respondent's members by threats of any kind. It participated in no combination to prevent the respondent from acquiring news or from distributing it. It did not interfere with any of the respondent's members or patrons, or make a contract for the exclusive right to supply its news to those with whom it dealt. It did not pass off its news as that of the respondent. There is no element of imitation, no false pretence, no fraud. Nothing has been done to mislead the public. In a word, it resorted to none of the methods which

are dealt with in the rapidly growing literature relating to unfair competition.

McLean v. Fleming, 96 U. S. 245.

Lawrence Mfg. Co. v. Tennessee Mfg. Co.,
138 U. S. 537.

Coats v. Merrick Thread Co., 149 U. S. 562.

Elgin Natl. Watch Co. v. Illinois Watch Co.,
179 U. S. 675.

The rule applied in *Singer Mfg. Co. v. June Mfg. Co.*, 163 U. S. 169, 185, to the case of expired patents or copyright is *a fortiori* applicable to a case where there has been no patent or copyright. The public has the right to make the machine or publish the book in the form in which it was constructed during the patent.

See also,

Dover Stamping Co. v. Fellows, 163 Mass.
191.

Bamford v. Douglass Post Card Machine Co., 158 Fed. Rep. 355.

Judge Hough, recognizing this fact, substitutes epithet for authority, and harks back to his contention, that by taking news from the bulletins and newspapers published by the respondent's members, its property rights are infringed upon. That contention has been fully dealt with and has no relevancy to the subject now under discussion.

To say, therefore, that the use of news acquired by the petitioner in common with the general public from bulletins and published newspapers, and the distribution of it among the petitioner's patrons, is parasitic, immoral and unfair, leads nowhere. When all is said and done, it means

only that the petitioner, when it sent out the news which it thus acquired, sent out as its own, news which another may have first collected. It makes no claim that the news has been collected by another and does not seek business upon a false representation to that effect.

The petitioner's subscribers, do not complain here. The truthfulness of the news which is thus disseminated is not questioned. Even assuming that the petitioner affirmatively stated to its patrons that it had collected the news in the first instance, what wrong has been done to the respondent by such a declaration? Certainly not such as would give rise to a cause of action.

It is difficult to conceive how the respondent can contend that acts precisely like those which were charged against it in *Tribune Co. of Chicago v. Associated Press*, 116 *Fed. Rep.* 126, constitute unfair competition. They were held to be lawful when committed by it. What is it that converts the same acts, when charged against the petitioner, into *dolus* or unfair competition?

If the petitioner is chargeable with unfair competition because it sells to its patrons information acquired from bulletin boards and newspapers maintained by respondent's members, then he who for profit and in competition with the inventor builds a machine or uses a process, or sells an article devised by one who fails to take out a patent or to ask for the allowance of sufficient or valid claims; or he who multiplies and sells for gain copies of a book or artistic production in competition with the author who neglects to take out a copyright, or fails to conform to the statute regulating the granting of copyrights, is equally guilty of unfair competition. The charge

of piracy, parasitism and immorality would apply to the latter as well. No court has, however, hitherto regarded such instances as presenting cases of unfair competition.

VI.

It is respectfully submitted that a writ of certiorari be granted as prayed for.

SAMUEL UNTERMYER,
LOUIS MARSHALL,
HENRY A. WISE,
WILLIAM A. DEFORD,
Petitioner's Counsel.

U. S. SUPREME COURT
FILED
SEP 28 1917
JAMES D. MAHER
CLERK

Supreme Court of the United States,

OCTOBER TERM, 1917.

No. **689** **221**

INTERNATIONAL NEWS SERVICE,
Petitioner,

AGAINST

THE ASSOCIATED PRESS,
Respondent.

MEMORANDUM OF RESPONDENT REGARDING PETITION FOR WRIT OF CERTIORARI.

Respondent does not oppose the petition, considering that the question is one which ought to be authoritatively settled for the whole country.

Of course we contest Points IV. and V. of Petitioner's Brief, in which the question is argued on the merits, but as this is not the occasion for consideration of that subject we shall not take it up, further than to refer to the opinions of Judge HOUGH (fols. 326-348) and of Judge HAND (fols. 296-318) in the successive Courts below.

Nor do we concur in the assertions of petitioner's Points II. and III. that there is a "diversity" or "conflict" of opinion on the subject. It is true that one of the Circuit

Judges dissented in the Court below, but there has been no "diversity" in any sense material to the petition for *certiorari*.

We do, however, concur in the proposition that the question is one of such general interest throughout the country that it deserves the authoritative consideration of this Court.

Stated in general terms, without reference to the specific parties to this case, this question is :

Whether the commercial and property rights of a news agency in an item of news collected by it (or of its subscribers in an item acquired by them), are totally lost immediately upon the first printing of the item in the first edition, so as to make it lawful for a rival news agency (or rival newspaper) to appropriate and sell the item commercially, in competition with the agency which collected it (or its subscribing newspaper).

Put concretely : Petitioner's claim is that it can appropriate an Associated Press item the moment it appears, for example, in the first copy of the *New York Times* (which comes off the press at about midnight) and sell it for printing in another paper competing with the *Times* at the breakfast table ; and also telegraph it to Western papers which, owing to the difference in time, can print and sell it in competition with the local Associated Press members who have paid their co-operative share of the cost of its collection.

The Court will perceive the vast importance of this question not merely to the parties in this particular case, but to all the newspapers of the country and to the whole industry of which they are the effective expression.

In the first place, the validity of the entire structure of news-collecting, distributing and marketing under modern conditions depends upon it—in other words, the whole supply of raw material upon which all newspapers must rely. If the commercial rights of a news-agency or of a newspaper to the items of news collected by them or at their

expense from all over the world disappear upon the utterance of the item in the earliest copy of the earliest edition of any member paper, there will be nothing left on which the business of news-gathering can be supported, because the vast expenditure required cannot be recouped by sale of a few single copies at one or a few cents each.

. Again, taking the question from the point of view of commercial sale of newspapers, it is evident that their local trade would (on the principle asserted) be at the mercy of any one who might chose to reprint and sell their issues without undergoing any expense for collecting the news itself.

Respondent would be quite content to rest its rights upon the decisions below without requesting this Court to assume the burden, except that nothing but a decision of this Court can assure this great service a sound and indisputable foundation and forestall a great quantity of costly and harassing litigation all over the country in both Federal and State Courts.

September 26, 1917.

PETER S. GROSSCUP,
FREDERIC B. JENNINGS,
WINFRED T. DENISON,
Respondent's Counsel.



Office Supreme Court, U. S.


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JAMES D. MAHER,
CLERK.

Supreme Court of the United States

OCTOBER TERM, 1917.

No.  221

INTERNATIONAL NEWS SERVICE,

Petitioner,

against

THE ASSOCIATED PRESS,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

PETITIONER'S BRIEF

SAMUEL UNTERMYER,
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Supreme Court of the United States,

OCTOBER TERM, 1917.

INTERNATIONAL NEWS SERVICE,
Petitioner,

against

THE ASSOCIATED PRESS,
Respondent.

No. 568.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIR-
CUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

Petitioner's Brief.

The sole purpose for which this writ has been sued out is to review the decision of the Court below which enjoins the Petitioner from using the Respondent's news after the publication thereof with its consent in newspapers represented in its membership, or with such consent displayed by such newspapers upon their bulletin boards, until the commercial value of such news has passed away.

The Complaint.

The respondent, in its bill of complaint, alleged that it is a cooperative organization incorporated in 1900 under the New York Membership Corporations Law, its members being the proprietors or representatives of some nine hundred and fifty newspapers published throughout the United

States, and that it is engaged in gathering news for the use of its members and distributing it among them for publication in the newspapers which they own or represent (*Rec.*, pp. 9, 10). It claims that the cost of collecting, transmitting and distributing the news to its members amounted in 1915 to more than \$3,000,000, which is being divided among its members.

It avers that the petitioner is a corporation organized under the laws of New Jersey, its business also consisting of the gathering and selling of news to its subscribers, composed of newspapers throughout the United States, under contract whereby its subscribers pay for the service rendered to them (*Rec.*, p. 12).

The complaint alleges that the petitioner has been engaged in appropriating news gathered by the respondent, and claims that this has been done by three specified methods:

(a) By arranging with telegraph editors and other employees of newspapers owned or represented by members of the respondent, whereby, for a consideration, they are said to have communicated to the petitioner news received by them from the respondent, and also local news gathered by its members for their use, as soon as it was received and before its publication by respondent's members.

(b) By making improper use of the membership held in the respondent by representatives of the New York American, the San Francisco Examiner and the Los Angeles Examiner, and inducing these members to disregard the secret and confidential character of the news transmitted to them and to permit representatives of the petitioner to copy news immediately upon its receipt from re-

spondent and to sell and transmit it to petitioner's subscribers prior to its publication by respondent's members.

(c) By copying the news furnished by respondent to its members from early bulletins and early editions of newspapers published by respondent's members and selling and transmitting it systematically to its subscribers throughout the United States, whereby it has been able to supply them with such news in many cases simultaneously with or prior to its publication by respondent's members (*Rec.*, pp. 12, 13, 98).

An injunction was prayed for to restrain the several acts charged to have been committed by the petitioner (*Rec.*, pp. 15, 16, 99).

The Answer.

The answer took issue with respect to all the material allegations of the bill of complaint. It alleged that the petitioner's business at all times since its organization has been that of obtaining and collecting and distributing to its subscribers, by means of its own instrumentalities, from sources all over the world, items of news and artistic and literary material for publication by its subscribers; that it has its own representatives and correspondents in the principal cities of the United States and abroad, and through them and by means of reciprocal arrangements with news agencies located in foreign countries, it gathers the important news of the world, which it promptly transmits to its subscribers, and that it furnishes the news collected by it to about four hundred newspapers published in the United States, Canada and abroad at an annual cost to it in excess of \$2,000,000 annually (*Rec.*, p. 102). Its

news service is of great value, and but for it and similar news agencies other than the respondent, which furnishes news to its subscribers only, many proprietors of newspapers throughout the United States would be unable to obtain and publish important items of news until after publication by respondent's members and when such information, because of such publication, has ceased to be news, and that but for the service of petitioner and such other news agencies the newspapers represented by membership in the respondent would enjoy a practical monopoly in the publication of news other than strictly local news, and the value and usefulness of all other newspapers throughout the United States would be greatly impaired, if not totally destroyed (*Rec.*, p. 103).

It is also alleged with respect to the charge denominated (c), that it is and has long been a well known and practically universal custom for publishers of newspapers in this country and abroad to obtain and read editions of newspapers published by others than themselves and for news agencies in this country and abroad, including both the respondent and the petitioner, to obtain and read editions of newspapers published by persons or corporations other than their members, customers, subscribers or clients, and to obtain therefrom various items of news, and for such news agencies, including the respondent, to rewrite such items of news therein contained as they deem of sufficient importance to interest their subscribers, and to publish them, sometimes with and sometimes without additional verification and without revealing the original source from which such news items were obtained (*Rec.*, p. 101).

The answer further alleged that the respondent

is and has been ever since its organization engaged in all respects in precisely the same practices which are charged by it to have been pursued by the petitioner (*Rec.*, pp. 104, 105).

The Injunction Order.

After the filing of the bill of complaint, the respondent moved for an injunction *pendente lite* for the relief prayed for in the complaint. This motion was made on an order to show cause based on carefully prepared affidavits, the motion being returnable in two days after the time fixed for service of the moving papers. In the short time that was allowed to the petitioner to meet these allegations, it procured depositions from a number of affiants, to which respondent was permitted to reply, and the case having thereupon been submitted to Hon. Augustus N. Hand, Judge of the District Court of the United States for the Southern District of New York, on April 13, 1917, he granted an order which restrained the petitioner "(a) From inducing, procuring or permitting any telegraph editors or other employees or agents of the complainant or any of its members or of any newspaper or newspapers owned or represented by them or any of them, or any such members, to communicate to defendant or to permit defendant to take or appropriate, for consideration or otherwise, any news received from or gathered for complainant, and from purchasing, receiving, selling, transmitting or using any news so obtained; (b) From inducing, procuring, directly or indirectly, any of complainant's members or any of the newspapers represented by them, to violate any of the agreements fixed by the charter and by-laws of the complainant." (*Rec.* pp. 4-7).

The order also contained the further provision (*Rec. p. 7*):

"It is further ordered that the motion of complainant for a preliminary injunction against the copying, receiving, selling, transmitting, using or causing to be copied, received, sold, transmitted or used any of the news furnished by complainant from bulletins and editions of newspapers published by any of the complainant's members, be, and it hereby is, denied, for the reason that, although the court is satisfied, both on the facts and the law, that the said practice is unlawful and inequitable, and that complainant is entitled to the injunction, upon condition that it submit to a similar injunction in favor of the defendant, which it has offered to do, the legal question is one of first impression and should remain for decision by the Circuit Court of Appeals before an injunction should be granted."

The Action of the Circuit Court of Appeals.

The petitioner appealed to the Circuit Court of Appeals for the Second Circuit from that part of the order which granted an injunction against it, and the respondent took a cross-appeal from so much of the order as denied its prayer for an injunction (*Rec. pp. 1-4*), the assignments of error appearing (*Rec. pp. 189-191*).

Thereupon that Court modified the judgment of the District Court by remanding the cause with directions to issue an injunction against any bodily taking of the words or substance of respondent's news until its commercial value as news had in the opinion of the District Court passed away (*Rec. p. 201*). In this decision Judges Hough and Rogers united, Judge Ward dissenting therefrom.

For the information of the Court and to illustrate the effect of the decision now sought to be reviewed, it may be stated that the order as entered by the District Court pursuant to the mandate of the Circuit Court of Appeals restrained the petitioner,

“(c) From copying, obtaining, taking, selling, transmitting or otherwise gainfully using, or from causing to be copied, obtained, taken, sold, transmitted or otherwise gainfully used the complainant’s news, either bodily or in substance, from bulletins issued by the complainant or any of its members, or from editions of newspapers published by any of complainant’s members, until its commercial value as news to the complainant and all of its members has passed away.”

It is a matter of public notoriety that the respondent thereupon issued the following notice to the petitioner:

“TO THE INTERNATIONAL NEWS SERVICE, ITS OFFICERS, AGENTS AND EMPLOYEES:

The members of The Associated Press shown upon the list herewith served upon you take the service of The Associated Press and are obligated by its by-laws to furnish to it exclusively the local news of their respective districts. You are hereby notified that all despatches hereafter published in newspapers shown upon said list credited to The Associated Press *or not otherwise credited and also the local news published therein* are the news of The Associated Press and that any appropriation and use by you of such news for sale or republication will constitute a violation of the injunction granted in the above entitled action, dated July 7th, 1917.

THE ASSOCIATED PRESS.”

The list referred to in the notice gives the names of approximately one thousand newspapers published in various States of the Union.

The Question presented by the Writ of Certiorari.

The petitioner thereupon applied to this Court for a writ of certiorari for the purpose of procuring a determination of the primary question as to whether or not the petitioner could be lawfully restrained from making use of news taken from bulletins issued by the respondent or any of its members or from editions of newspapers published by any of them. The respondent joined in this request, and the petition was granted. No other question will be presented on the argument, since that involves a fundamental principle the determination of which is not dependent on controverted questions of fact; whereas the other questions presented by the pleadings are questions of fact, the determination of which will depend upon the examination and cross-examination of witnesses.

Depositions are now being taken with respect to those other issues presented by the pleadings as to which an interlocutory injunction has been granted. In view of the fact that the ultimate decision as to those features of the case will largely depend on the testimony taken and to be taken, they will not be discussed.

The facts bearing on the single legal proposition which is to be discussed, except so far as they relate to the respondent's similar practices, are not the subject of controversy.

The Respondent's By-Laws.

The respondent has upwards of nine hundred and fifty members. The petitioner has approximately four hundred and fifty subscribers. The respondent, in 1915, spent approximately \$3,500,-

000 in gathering and distributing its news, the entire cost of which was assessed among its members on a co-operative basis. The petitioner gathers and distributes its news to its subscribers at an annual cost of upwards of \$2,000,000.

There are no provisions in the charter of the respondent to the effect that news collected by it shall remain confidential and secret until its publication by all of respondent's members (*Rec., p. 172*). The only provisions of respondent's by-laws applicable to the protection of news furnished by it read (*Rec., pp. 172, 173*):

“ARTICLE VII.

SEC. 4. The news service of this corporation shall be furnished only to members thereof, or to the newspapers represented by them and specified in their certificates of membership.”

SEC. 5. A member shall *publish the news of The Associated Press* only in the newspaper, the language and the place specified in his certificate of membership and he shall not permit any other use to be made of the news furnished by the Corporation to him or to the newspaper which he represents.

SEC. 6. The time limits for the receipt and publication of news by members shall be (standard time in all cases at the *place of publication*) as follows: Morning papers to receive not later than 9 a. m. and to *publish* not earlier than 9 p.m., except that for editions to be circulated only outside of the *city of publication* not earlier than the following morning, morning papers may *publish* not earlier than 5 p. m. and that Sunday editions so *published may be circulated* in the *city of publication* after 9 p. m. Saturday; afternoon papers to receive not later than 6 p. m. and to *publish* not earlier than 9 a. m. The service

to afternoon papers between 4 p. m. and 6 p. m. to be of bulletin character; provided, that the Board of Directors may authorize that upon extraordinary occasions The Associated Press dispatches may be used in extra editions or for bulletins outside of the hours named.

SEC. 8. No news furnished to the Corporation by a member shall be supplied by the Corporation to any other member publishing a newspaper within the district which the Board of Directors shall have described in defining the obligations of such member to furnish news to the Corporation."

"ARTICLE VIII.

SEC. 6. No member shall furnish, or permit any one in his employ or connected with the newspaper specified in his certificate of membership to furnish, to any person who is not a member, the news of the Corporation *in advance of publication*, or to another member any news received from the Corporation which the Corporation is itself debarred from furnishing to such member, nor conduct his business in such a manner that the news furnished by the Corporation may be communicated to any person, firm, corporation or association not entitled to receive the same.

SEC. 7. No member shall furnish, or permit any one to furnish, to any one not a member of this Corporation, the news which he is required by the By-laws to supply to this Corporation" (*Rec.*, p. 173).

It further appears (*Rec.*, pp. 173, 174), that on April 21, 1913, the Board of Directors of the respondent adopted a resolution that the public display of news upon bulletin boards at the main or branch offices of a newspaper in its own territory, does not constitute a violation of the by-laws which

provide that no member shall furnish the news of The Associated Press *in advance of publication* to any person who is not a member of the Associated Press.

Pursuant to these provisions it has been the practice of various members of respondent to make a public display of news obtained by them from the respondent, upon bulletin boards at the main or branch offices of newspapers represented by such members in the territory in which they are published. Many of the newspapers represented by membership in the respondent publish and circulate early editions in conformity with the permission conferred upon them by Articles VII and VIII of the respondent's by-laws, *supra*.

*The Prevailing Custom of Obtaining News from
Early Editions of Newspapers.*

The petitioner and other news agencies, in accordance with the prevailing custom, read the early editions of newspapers and obtain from them and from bulletin boards the information which they disclose, and rewrite such items of news so published as they deem of sufficient importance to interest their subscribers, and publish them. Mr. Wilson, the petitioner's General Manager, says (*Rec. p. 120*):

"In addition to the sources of information which the defendant has and maintains, the defendant, through its employees, reads each day a great number of newspapers for items of news therein contained which have not been received by the defendant through other sources, and, as does every other newspaper and news agency in this country and abroad, rewrites for publication any news therein con-

tained which it deems of sufficient importance to interest its subscribers, and as rewritten, furnishes such subscribers therewith."

That the respondent pursued the same practice with respect to news collected by the petitioner and other agencies as published in the newspapers of the subscribers of the latter, appears from the affidavits of some of the respondent's former employees. Thus Edward R. Sartwell, who from May, 1912, until December, 1915, was employed by the respondent as an editor and reporter in its Washington office, says (*Rec. p. 162*):

"While I was in the Washington Bureau of The Associated Press it was the custom of the employees of that bureau to obtain as soon as they were printed the various newspapers published and circulated in the City of Washington, among others, the Washington Herald, a newspaper which at that time was a subscriber to the news service of the International News Service, or its predecessor, the National News Association; and the Washington Times, which was a subscriber to the news service of the United Press. Both these papers were carefully read by the staff and such items of news taken therefrom, although not originating with the Associated Press, and were rewritten, and sent out to the members of the Associated Press, whenever the stories were of sufficient importance, in the judgment of the employees of the Washington Bureau of the Associated Press to warrant their being sent out."

William M. Baskervill, who was employed by The Associated Press from May 11, 1911, to December, 1914, in various capacities, says (*Rec. pp. 163, 164*):

"During the entire period of time, as aforesaid, that I was employed by and connected with The Associated Press, the complainant frequently sent out from its Atlanta office stories and items of news which had appeared in the Atlanta Georgian, a newspaper which at that time did not take any Associated Press service. For instance, in the case of an important item of news occurring somewhere in the Southern Division, above mentioned, which was reported in the Atlanta Georgian ahead of the other Atlanta papers, or ahead of the Associated Press correspondents, we would take that story and rewrite it and send it out on the Associated Press leased wire to the various parts of the country and to our members in the Southern territory. This was a common and invariable practice unless there was some obvious reason for doubting the authenticity of the story.

"In the case, however of an item of news of unusual importance appearing in the Atlanta Georgian, or in any other Southern paper, other than an Associated Press paper, and which originated outside of said Southern territory, or abroad, we would immediately, as soon as we learned of the existence of said article, transmit by telegraph, to the main office of The Associated Press in New York, a tip, giving the point of origin and the nature of the story, and would indicate the news service which had sent out the story in the manner following:

"During the early part of my service with The Associated Press, we used the word 'opposition' to indicate any news service other than that of The Associated Press, * * * Later on, The Associated Press adopted a code system and as a part thereof adopted a code word for 'Hearst' which was to be used in indicating to The Associated Press, in New York, that the International News Service, or some Hearst newspaper, was car-

rying a particular story which The Associated Press did not have, or which our bureau had not, to that time, received from The Associated Press. The practice above described was in constant operation during the time that I was connected with The Associated Press, and is a common and well recognized newspaper and news service practice."

William Schwinger was employed by The Associated Press at its Chicago office in August and September, 1916. Referring to this practice he says (*Rec. p. 166*):

"During the time I was so employed, which was about a month, on several occasions I sent out, in the regular course of my duties, articles of news which had previously been published by the Chicago Examiner and the Chicago Herald, and which had been rewritten by H. L. Remick, an editor of The Associated Press. These articles so written and sent out by me were sent out to members of The Associated Press on my wire, namely: newspapers in Minneapolis, St. Paul and elsewhere. The Chicago Examiner is not a member of The Associated Press, nor does it receive its news service. The articles of news to which I have referred and which I sent out, were items of news which The Associated Press had not received from its correspondents, to the best of my belief."

Fred Harvey (*Rec. p. 167*), John M. Fletcher (*Rec. p. 168*), Homer V. Hogan (*Rec. pp. 169, 170*), and Lloyd E. Thrush (*Rec. p. 171*), all of them at various times employed by The Associated Press in different localities, testified to the same procedure.

On August 18, 1913, Melville E. Stone, the General Manager of the respondent, issued a general order which reads (*Rec. p. 86*):

“Operators who copy the reports in newspaper offices at non-bureau points should be alert to see that The Associated Press is protected promptly when big news events occur in their cities. They should immediately call to the attention of editors the necessity of a bulletin, and if a bulletin is not quickly offered, should themselves send a message of information to their controlling bureau.

Bureau points will make note of such assistance on the part of operators and it will be recognized in the record of their service.”

The respondent, while conceding that its representatives at various points would obtain as soon as they were printed all of the newspapers published or circulated in the localities where they represented the respondent, contends that this was for the sole purpose of obtaining the information that a certain event was said to have happened, and that thereupon The Associated Press would undertake an independent investigation of the facts and write the story on the strength of such independent investigation (*Rec. pp. 90-98*).

In the Court below respondent's counsel sought to draw a distinction between what was claimed to be its practice and that charged to have been followed by the petitioner. They say (*Rec. p. 183*):

“At this point there should be noted a clear and vital distinction between two kinds of use to which news taken from newspapers is put. The one use is for the purpose of obtaining the mere information or rumor that such and such an event has happened. Upon receipt of this information or rumor the news distributing service then proceeds to obtain the news by its own independent investigation from the original sources at its own expense, and the only story sent out is based solely upon the strength of such investigation. This

has been a recognized practice among all news agencies, and has existed by common consent.

The other use is to send out a story based in whole or in part upon the news obtained from the newspaper without independent investigation. This use may include the sending of the bare statement of the fact of the event, or a more extended copy of the details of the story for the rival news agency. This practice has never been recognized as fair or proper and has never been adopted or allowed by the complainant. * * *

This 'tip' when received by The Associated Press is used, not textually nor in any modified form as a despatch to the papers within its fold, for publication by them, but as a suggestion for investigation. An inquiry is set on foot and an independent news report may be developed and used."

This attempted distinction, which is quoted in the opinion of Judge Hand (*Rec. p. 183*), did not, however, impress him as sound, for he says (*Rec. pp. 183, 184*):

"It is evident from the foregoing statement, as well as from the proofs as a whole, that both sides think news when published by any subscribers to a competing news agency may properly be investigated, and if verified, the result of the verification may be sold. It is to be noted, however, that the original news if ex-hypothesi the product of the labor and capital of him who gathers it and whether it be treated as a mere 'tip' for further investigation, or as an authentic and final report, it cannot be used by a rival news agency without depriving the gatherer of the very thing which is of value to him, namely, the power to control the sale of the news he has gathered until sufficient time has elapsed to enable it to be published by all the newspapers he supplies. Moreover, there is something rather grotesque in going through the form of

verifying a tip no matter how authentic it may be. In many cases the verification with modern telephonic communication would be so rapid that the time required for it would in no sense protect the original gatherer of the news. I cannot but feel that this matter of independent investigation is rather a question of business policy for the news service that receives the tip, than of substantive law or fair dealing. In other words, the real matter for consideration is whether news gathered and sold to a newspaper which publishes it can be used after publication by a competing news agency either as a tip for further investigation, or as authentic news for immediate distribution before sufficient time has elapsed for the news to be published within the territory in which the gatherer is engaged in the general dissemination of news. This question is most novel and important."

POINTS.

I.

Assuming that the respondent has a right of property in the knowledge of the news which it collects, against the surreptitious appropriation of which before publication it is entitled to protection, the publication, with its consent, of such news when not copyrighted, by some of its members, in their newspapers or upon bulletin boards, renders lawful the subsequent use of it by the public or any part of it.

Taking the view most favorable to the respondent, the news collected by it until publica-

tion by one of its members, was subject to its control. It could have withheld it from the public had it so chosen. It could have prohibited its members from communicating it to any other person. As between it and its members it could regard the news until the time for its publication arrived, as charged with a trust.

When, however, with its sanction and express approval and as the result of the use of the news for the specific and only purpose for which it is distributed, that of publication, a portion of its members communicate that news to the general public by posting it upon a bulletin board so that all may read it, or by issuing it in their newspapers and distributing it indiscriminately in millions of copies throughout the country, the respondent no longer has the right to control the use to be made of the news thus unleashed from the bonds of secrecy. When it thus reaches the light of day, it becomes the common possession of all to whom it is accessible. The purchaser of a newspaper containing it has the undoubted right to communicate the intelligence which it embodies to anybody, either by handing over the newspaper to be read or by oral statement of its contents, or by telephoning or telegraphing them. He has the absolute right to read the despatches found in the newspaper to whomsoever he chooses, whether it be to the worshippers in a church or to an audience in a public hall, or to the attendants at a public meeting, however numerous they may be. No limitation upon the use to be made of the news, by contract or otherwise, is imposed upon the purchaser of the newspaper or on the reader of a bulletin, to whom it is communicated in an unmistakable effort to give it publicity.

The newspaper and the bulletin are highly developed organs of publicity. To attain it is their avowed and practically their only function. The bulletin boards are erected along public thoroughfares, ordinarily in the business centers of the important cities of the land. The news displayed upon them is intended to catch the public eye. It is displayed in such a manner as to rivet the attention of the passer-by. If it fails in that object, it defeats the very purpose of its existence. It is a direct appeal to the public. It is an ancient contrivance——

“This to the public eye?”

“I’ the common showplace where they exercise.”

The same is true of a newspaper, which, with its glaring headlines, is designed to tempt the public into purchasing and reading the news thus proclaimed as with a voice of a trumpet. The news which it contains of necessity becomes the possession of the purchaser of the paper on which it is printed.

In the case of journals published in the City of New York which carry the petitioner’s or the respondent’s news, the readers run into the millions. They include citizens of every State. Every one of them, should he desire to do so, must of necessity have the right to transmit the intelligence thus publicly imparted to him to any person or group of persons or to any community in which he may be interested, though located in the remotest corner of the land. He has purchased the news without restriction, limitation or condition as to the use that he may make of it. An attempt to enjoin him from using it would be regarded as ludicrous.

The posting of the news supplied to its members by the respondent on bulletin boards, and its pub-

lication in early editions of newspapers are expressly authorized by it, the only limitation imposed being as to the hours of publication. It is not pretended in the present case that any bulletins displayed or newspapers issued from which the petitioner is claimed to have derived information, contravened the authority conferred upon its members in the respondent's by-laws. Such display and publication, being permissive, did not and could not constitute a breach of trust or confidence on the part of the respondent's members. They did what they had the right to do, and what the respondent and their co-members of The Associated Press consented that they might do.

By this permitted publication, the news which was thus given to the world for the purpose of becoming a part of its general stock of information, ceased to be the property of the respondent and became the possession of the whole or that part of the public to which it was communicated by these authorized agencies. This was not an accidental consequence. It was one necessarily contemplated by the respondent. When it permitted its members or any part of them to print and sell the news in the early editions of their newspapers, and to post it on their bulletin boards, it must have been with the intent that the only conceivable purpose for which the news had been acquired was to be accomplished, namely, that it should be published.

Hence, exclusive ownership of the news by the respondent cannot, from the very nature of things, survive its publication in regular course by one to whom the news has been communicated by it for that specific purpose. Private property in the news dies with its publication, as inevitably as does that of a trade secret by proclaiming

it to the public ear. When thus published, it is no more subject to private ownership than is the water that has flowed over a dam.

Before proceeding to a consideration of the decisions bearing on the subject, it will be useful to pause long enough to read the conclusions contained in the dissenting opinion of Judge Ward (*Rec. pp. 201, 202*):

“A distributor of news, that is, of his information about things that have happened, neither invents nor composes nor manufactures anything, nor does he supply something which the public buys because it believes it originates with him and wants his article. Nor does he own the news, but only his knowledge of the news. Therefore analogies from property created or protected by the patent, copyright or trade-mark statutes or by the principles regulating unfair competition are wholly inapplicable. The distributor’s knowledge of news which he has gathered is his property so long as he keeps it to himself or communicates it only to others on condition that they will do so. He will be protected against any one who surreptitiously obtains this information from one of his members, subscribers, or employees or by any form of pilfering or unfair means. Such were the cases (then follows a list of the decisions on which the respondent relied). In every one of these cases the court found that the defendant got the news or the quotations surreptitiously and enjoined him for that reason. They abundantly support an injunction on the first grounds mentioned in the opinion of the Court. But if the distributor publishes, to use a word in this connection which I think has been unreasonably criticised, or abandons or dedicates or communicates his information to the world, his right of property in his information and his right to be protected against the use of it is gone.”

It has been conceded by the respondent that facts are public and not private property. That is succinctly declared by Judge Hough in *Davies v. Bowes*, 209 *Fed. Rep.* 54, 56. That idea is likewise expressed by Judge Grosscup in *Tribune Co. v Illinois Pub. & Pr. Co.*, 76 *Publishers Weekly*, 643, 947, where the question was presented as to whether Peary's account of his discovery of the North Pole could be copyrighted. That evoked the following comment:

"A scientist makes a discovery in natural law. He puts that in the form of a book. He copyrights that book. The law protects him in that copyright, but having stated a fact as, for instance, the discovery of the telephone, the world may take up and state and discuss that fact as the world may take up and state and discuss this Peary pamphlet or book when it appears. It is the composition in which that fact is embodied that is protected. It is not the fact. The facts are public property. There is no question about that. The moment he publishes it, it is public property; but the way in which he does it, that is private property."

See also,

West Publishing Co. v. Lawyers Co-operative Publishing Co., 75 *Fed. Rep.* 556;
122 *Fed. Rep.* 922; 176 *Fed. Rep.* 839.
Clayton v. Stone, 2 *Paine*, 382.
Baker v. Selden, 101 *U. S.* 99.

In the present case there has been no attempt on the part of the respondent to copyright its news; nor is it pretended that the decree which it has obtained in this case is grounded on any statutory right either of copyright or otherwise.

The respondent must, therefore, stand or fall on a common law right. Thus regarded, it is certainly not understating its case to say that its position is not more favorable than is that of the creator of a work of literary and artistic merit,—that of a poet, a historian, an essayist or a novelist, whose intellectual products unquestionably possess all of the attributes of property. Yet it is a well settled principle of the common law that, in the absence of a copyright derived from a legislative enactment, the publication of such a work amounts to a dedication of it to the public, and confers a universal right of reproduction and use whether for purposes of gain or otherwise. Copyright property is wholly statutory.

American Tobacco Co. vs. Werckmeister,
207 U. S. 284.

White-Smith Music Co. vs. Apollo Co., 209
U. S. 1.

Bobbs-Merrill Co. vs. Straus, 210 U. S. 346.

As long ago as in 1774 the House of Lords in *Donaldson v. Beckett*, 4 Burr, 2408, Note; 2 Brown's P. C. 129, laid down principles which indicate that there can be no ownership in news at common law after publication. To the same effect are:

Tribune Co. of Chicago v. Associated Press,
116 Fed. Rep. 126.

New York Times Co. v. Sun Pub. & Pr. Co.,
204 Fed. Rep. 586.

Tribune Co. v. Illinois Pub. & Pr. Co., 76
Publishers Weekly, 643, 947.

Walter v. Steinkopff, L. R. 3 Ch. Div. 489.

Particular attention is called to the first of these decisions, *Tribune Co. of Chicago v. Associated Press*, 116 Fed. Rep. 126. The respondent here is the successor of the defendant there, a voluntary association which on being ousted from the State of Illinois (*Inter-Ocean Pub. Co. v. Asso. Press*, 56 N. E. 822) was simultaneously reorganized as the respondent, a New York corporation.

It there appeared that the Chicago Tribune, by agreement, secured the right to use such parts of the special war dispatches of the London Times and its editorial comments thereon, as the Tribune might select and telegraph to America, and the Times abandoned in favor of the Tribune "any copyright in those telegrams so far as publication in America is concerned." The selections were made and cabled from the Times office, and were published in the Tribune on the same morning as in the Times, though some hours later. *The Associated Press, doing the very thing for which it now denounces the petitioner, and which it then defended as virtuous*, "selected" (as it euphemistically described its act, which, when done by the petitioner it calls "pirated") the news thus obtained by the Tribune and distributed it among its members, and then proceeded to defend its action successfully. The court very properly held that no copyright had been acquired under the statute by the Tribune, and as to its claim of common law rights said:

"Literary property is protected at common law to the extent only of possession and use of the manuscript and its first publication by the owner,—a right well exemplified in *Publishing Co. v. Monroe*, 73 Fed. Rep. 196. With voluntary publication the exclusive right is determined at common law, and the statutory

copyright is the sole dependence of the author or owner for a monopoly in the future publication. Unless the United States statute is applicable to protect the Tribune's publications in question, it is clear that the motion for an injunction must fail. * * * As the exclusive right of publication at common law terminates with the publication in London, no protection then exists beyond that expressly given by the statute. Before the amendment authorizing copyright in America on foreign publications, under prescribed conditions where the publication is simultaneous, such foreign property right was left unprotected."

In *Drone on Copyright*, pp. 169, 170, the author after indicating that under certain conditions news matter might be copyrighted, added:

"If any uncopyrighted composition be published in an uncopyrighted newspaper or periodical, it becomes common property and may be republished by any one."

In *Bowker on Copyright*, the author says, at pp. 88, 89:

"In respect to news there is no provision in the new code. A bill to protect news for twenty-four hours was at one time before Congress, but was never passed. There is, therefore, no copyrighted protection for news as such, but the general copyright of the newspaper or a special copyright may protect the form of a dispatch, letter, or articles containing news. Thus the *New York Herald* copyrighted without question Dr. Cook's Arctic dispatches, and the question as to the copyright by the *New York Times* of Commander Peary's dispatch describing his dash to the Pole hinged solely on the question of ownership or authority to copyright, as set forth

in a later chapter. But any such copyright could not prevent publication by other newspapers of the news that Cook and Peary claimed to have reached the North Pole at stated dates and under stated circumstances, though their own form of statement of the facts could not lawfully be copied except within 'fair use.' "

It is significant that in the present case the respondent has thus far succeeded in procuring by judicial decree rights which Congress in the exercise of its legislative power deemed it wise to withhold.

Wheaton v. Peters, 33 U. S. 591, expounded the American doctrine applicable to the subject, Mr. Justice McLean saying (p. 657):

"That an author, at common law, has a property in his manuscript, and may obtain redress against any one who deprives him of it, or by improperly obtaining a copy endeavors to realize a profit by its publication, cannot be doubted; but this is a very different right from that which asserts a perpetual and exclusive property in the future publication of the work, after the author shall have published it to the world. The argument that a literary man is as much entitled to the product of his labor as any other member of society, cannot be controverted. And the answer is, that he realizes this product by the transfer of his manuscripts, or in the sale of his works when first published. A book is valuable on account of the matter it contains, the ideas it communicates, the instruction or entertainment it affords. Does the author hold a perpetual property in these? Is there an implied contract by every purchaser of his books, that he may realize whatever instruction or entertainment which the reading of it shall give, but shall not write or print its contents?

“In what respect does the right of an author differ from that of an individual who has invented a most useful and valuable machine? In the production of this, his mind has been as intensely engaged, as long, and, perhaps, as usefully to the public, as any distinguished author in the composition of his book. The result of their labors may be equally beneficial to society, and in their respective spheres they may be alike distinguished for mental vigor. Does the common law give a perpetual right to the author, and withhold it from the inventor? And yet it has never been pretended that the latter could hold, by the common law, any property in his invention after he shall have sold it publicly. It would seem, therefore, that the existence of a principle may well be doubted, which operates so unequally. This is not a characteristic of the common law. It is said to be founded on principles of justice, and that all its rules must conform to sound reason. Does not the man who imitates the machine profit as much by the labor of another as he who imitates or republishes a book? Can there be a difference between the types and press with which one is formed, and the instruments used in the construction of the others? That every man is entitled to the fruits of his own labor, must be admitted; but he can enjoy them only, except by statutory provision, under the rules of property which regulate society and which define the rights of things in general.”

The American doctrines as formulated in *Wheaton vs. Peters* received careful consideration and were practically adopted in *Jefferys v. Boosey*, 4 H. L. Cas., 815, 962, 965. 967. which involved the right to Bellini's opera *La Sonnambula*. There Lord Brougham said:

“The right of the author before publication we may take to be unquestioned, and we

may even assume that it never was, when accurately defined, denied. He has the undisputed right to his manuscript; he may withhold, or he may communicate it, and, communicating, he may limit the number of persons to whom it is imparted, and impose such restrictions as he pleased upon their use of it. The fulfilment of the annexed conditions he may proceed to enforce, and for their breach he may claim compensation. But if he makes his composition public, can he retain the exclusive right which he had before; is he entitled to prevent all from using his manuscript by multiplying copies, and to convene this use of it to those whom he specially allows so to do? Has he such a property in his composition as extends universally and enures perpetually, the property continuing in him wheresoever and whensoever that composition may be found to exist? In other words, can his thoughts, or the results of his mental labor, or the produce of his genius, be considered as something fixed and defined, which belongs to him exclusively at all times and in all places?

“First, let us observe that this question cannot be confined to the form, whether written or printed, which that composition takes, or in which these thoughts are conveyed. If it is clear that before publication the author has the right, and may proceed against those to whom he imparts his manuscript under conditions, it is equally clear that if he had communicated his composition to them verbally under such conditions, he could have complained of a breach. The question is personal between him and them. But if instead of orally delivering his composition to a select number, he delivered it to all who came and heard him, imposing no restriction, he could not complain with effect of any one repeating it to others who had not been present. Now, there seems no possibility of holding that he

can prevent the persons to whom he gave or sold his paper, whether written or printed, from making their own use of it, without also holding that he could proceed against his auditors unwarned. If each of these might repeat what he had heard, each of those might lend the paper or book, and could only be tied up from so doing by express stipulation, imposing restrictions upon him when he received it. So, if he could lend it, he could copy it and give or sell his copy unless so tied up.

* * * * *

“There is nothing in the thought of the person resembling the substance to which the incorporated hereditament is related. They are of too unsubstantial, too evanescent a nature, their expression of language, in whatever manner, is too fleeting, to be the subject of proprietary rights. *Volat irrevocabile verbum*, whether borne on the wings of the wind or the press, and the supposed owner instantly loses all control over them. When the period is demanded at which the property vests, we are generally referred to the moment of publication. But that is the moment when the hold of the proprietor ceases. He has produced the thought and given it utterance, and *eo instanti*, it escapes his grasp.

“Thus, whatever may have been the original right of the author, the publication appears to be of necessity an abandonment; as long as he kept the composition to himself, or to a select few placed under conditions, he was like the owner of a private road; none but himself or those he permitted could use it; but when he made the work public he resembled that owner after he had abandoned it, who could not directly prohibit passengers, or exact from them a consideration for the use of it.”

Further on the opinion continues:

"It is said that literary and scientific men are left without protection, and that the invaluable product of their labours is unduly estimated by the common law, if the right in question be not recognized. But the negation of that right only implies that we refuse to acknowledge a property in things by their nature incapable of being held in severalty, and that we recoil from adopting a position which involves contradiction. The contradiction is, that one can retain that which he parts with, and can dedicate it to the public, or at least do an act which necessarily involves such dedication, and yet keep exclusive possession of the thing dedicated and retain all the rights he had before the dedication."

In *Holmes v. Hurst*, 174 U. S. 85, which related to the copyright of "The Autocrat of the Breakfast Table" as published in the Atlantic Monthly, Mr. Justice Brown, after citing *Donaldson v. Becket*, *Wheaton v. Peters* and *Jeffreys v. Boosey*, *supra*, said:

"While the propriety of these decisions has been the subject of a good deal of controversy among legal writers, it seems now to be considered the settled law of this country and England that the right of an author to a monopoly of his publications is measured and determined by the copyright act—in other words, that while a right did exist by common law, it has been superseded by statute."

The opinion also contains the following significant statement:

"If an author permit his intellectual production to be published either serially or collectively, his right to a copyright is lost as effectually as the right of an inventor to a

patent upon an invention which he deliberately abandoned to the public—and this, too, irrespective of his actual intention not to make such abandonment.”

These principles received application in *Jewelers' Mercantile Agency v. Jewelers' Publishing Co.*, 155 N. Y. 241, where the plaintiff collected information as to the business and credit of persons in the jewelry trade and printed such information twice a year in a reference book which it furnished to such persons as subscribed therefor. under a contract which designated the transaction as a “loan” of the volumes, and provided that the information supplied should be confidential and should not be disclosed, that title to the book should remain in the agency, and that the loan might be terminated on returning to the subscriber the amount of the unexpired subscription. The defendant appropriated from the plaintiff's reference book material information and used it in a competing publication. There was an ineffectual attempt to secure a copyright. The action was brought to restrain the defendant on common law grounds. Relief was denied, the Court saying:—

“But publication also operates to destroy the common law rights, whether a copyright be secured or not. An invention, a painting or a book is the property of its creator. He may keep it for his own exclusive use or enjoyment if he sees fit. The public has no greater right to it, however useful it may be, than it would have to any other part of his personal property. But if he once publishes it, his property right in it is gone and everyone may make use of it. * * *

“Out of a few cases of the same general

character seems to have grown the idea that it is possible for a man by putting restrictions on the use of his books by subscribers, however numerous they may be, to retain in himself forever the common law right of first publication. If that position be sustained by the judgment of the courts, then will have been obtained judicial legislation of far broader scope and much greater value to authors and others than that offered by the copyright statute. * * *

"If the plaintiff's interests are of so important a character, and the public interests would be best subserved were the law such as plaintiff insists it to be, then is presented a proper subject for legislative action. But our examination leads us to the conclusion that the present state of the law is that if a book be put within reach of the general public, so that all may have access to it, no matter what limitations be put upon the use of it by the individual subscriber or lessee, it is published, and what is known as the common law copyright, or right of first publication, is gone."

That the posting of bulletins and the issuance of early editions of newspapers by the members of the respondent were regarded by it as a publication is clearly shown. The printing of the news gathered by the respondent in the newspapers of its members is in the bill of complaint repeatedly referred to as a "publication." Thus, we find the following expressions:

"newspapers, both evening and morning, *published* throughout the United States" (*Rec. p. 9*); "and distributing the same among its members for *publication* in the newspapers owned or represented by them under and subject to the provisions of its by-laws" (*Rec. p. 10*); "all news which is collected by the respondent is promptly transmitted by wire or telephone or other appro-

priate means to its members for *publication* in their newspapers" (*Rec. p. 10*); "an essential part of the plan of operation of the complainant accordingly is that news collected by it shall remain confidential and secret until its *publication* has been fully accomplished by all of complainant's members" (*Rec. p. 11*).

It may be here parenthetically stated that there is no contract, agreement or by-law by which the news is to remain confidential and secret until it has been published by all of respondent's members. Respondent is attempting by judicial decree to have that declared to be secret which by its own agencies and with its consent has been made public.

Proceeding with an examination of the bill, we find that in the charging part it is alleged:

"(a) It has arranged * * * to have communicated to it news received by them from complainant * * * before its *publication* by complainant's members."

"(b) It has made improper and unconscionable use of the memberships * * * to sell and transmit the same to defendant's clients and customers prior to its *publication* by complainant's members."

"(c) It has copied the news furnished by complainant to its members from early bulletins and early editions of newspapers *published* by complainant's members." (*Rec. p. 13*).

In paragraph XIII of the bill of complaint it is averred:

"Competition has to some extent existed between the complainant and the defendant, in respect to speed in the collection of news,

promptness in its distribution, secrecy *prior to publication* and the cheapness of the service." (Rec. p. 14).

By Articles VII and VIII of respondent's by-laws the act of issuing a newspaper is referred to as "publishing" the news or as a "publication" of the news, no less than eleven times, and as has already been stated there is nothing in the by-laws which even undertakes to limit the effect of publication in an early edition or of the posting of a bulletin. To attempt to do it was apparently regarded as a futile as well as an unwarranted effort to legislate.

In this connection the decisions in *Bobbs-Merrill Co. vs. Straus*, 210 U. S. 339, *Bauer vs. O'Donnell*, 229 U. S. 1, *Straus vs. Victor Talking Machine Co.*, 243 U. S. 490; *Motion Picture Patents Co. vs. Universal Film Mfg. Co.*, 243 U. S. 502 and *Boston Store vs. American Graphophone Co.* (decided by this Court on March 3, 1918), suggest interesting analogies.

It necessarily follows, that if with the respondent's consent the news which the petitioner is claimed to have copied had been printed in the form of an uncopyrighted book, magazine or pamphlet, the petitioner could have multiplied copies of it without number and circulated them wherever it desired. How is the situation bettered by the fact that the publication was in a daily newspaper and that the subject-matter of the publication was one of passing interest?

The principle that applies to literary property is equally applicable to any idea, trade secret or business plan which one may conceive or originate. Following the decision in *Peabody v. Nor-*

folk, 98 Mass. 452, Judge Landon said in *Bristol v. Equitable Life Assurance Society*, 132 N. Y. 264:

“Without denying that there may be property in an idea, or trade secret or system, it is obvious that its originator or proprietor must himself protect it from escape or disclosure. If it cannot be sold or negotiated or used without a disclosure, it would seem proper that some contract should guard or regulate the disclosure, otherwise it must follow the law of ideas and become the acquisition of whoever receives it.”

In that case the plaintiff alleged that in order to induce the defendant to employ him, he communicated to it in confidence a new system of soliciting business, and that the defendant, without plaintiff's knowledge, commenced the use of the system and continued it against his protest and derived large profits, for which he sought an accounting. It was decided that no cause of action was set forth, the Court saying:

“The allegation of the complaint that the plaintiff disclosed the system in confidence to the defendant is vague. It does not necessarily mean that the defendant agreed not to use it; it may mean something else. Defendant is at liberty to conduct its business in its own way; it obtained a valuable hint from the plaintiff and assumed no legal obligation to pay the plaintiff if it should conclude to act upon it.”

In *Stein v. Morris*, 91 S. E. Rep. 176, the complainant sought to restrain the defendant from using a plan of banking known as the Morris Plan of Industrial Banking, which he claimed to have communicated to the defendant. His prayer was denied, the Court saying:

"If, however, appellant had originated the scheme or idea of banking of which he claims to be the owner, he could not have a property right in such method or idea for conducting business without any physical means or devices for carrying it out. In other words, he could not put such an idea into operation without it at once escaping his own grasp and becoming the property of mankind."

In *Hamilton Mfg. Co. v. Tubbs*, 216 *Fed. Rep.* 401, it is said:

"Where an idea, or trade secret or system, cannot be sold or negotiated or used without a disclosure, it would seem proper that some contract should guard or regulate the disclosure, otherwise it must follow the law of ideas and become the acquisition of whoever receives it."

In *Haskins v. Ryan*, 71 *N. J. Eq.* 575, 64 *Atl. Rep.* 436, Vice-Chancellor Stevens said, in a similar case:

"The means of carrying out the plan, or giving effect to the idea, lay, therefore, beyond his control. It was an idea depending for its realization upon the concurring minds of many individuals, each of them unbound by contract and free to act as he chose. Such a project or idea can scarcely be called 'property.' It lacks that dominion, that capability of being applied by its originator to his own use, which is the essential characteristic of property. It differs fundamentally from the secret process or patented invention which is capable of material embodiment at the will of the inventor alone. It is worthless unless others agree to give it life. It was, as far as complainant was concerned, an idea pure and simple. Now it has never, in the absence of contract or statute, been held, so far as I am

aware, that mere ideas are capable of legal ownership and protection. Says Lord Brougham, in delivering his judgment in *Jeffreys v. Boosey*, 4 H. L. Cas. 965: 'Volat irrevocabile verbum, whether borne on the wings of the wind or the press, and the supposed owner instantly loses all control over it. * * * He has produced the thought and given it utterance, and eo instante it escapes his grasp'."

In *Westcott Chuck Co. v. Oneida National Chuck Co.*, 199 N. Y. 247, it was held that when a patent has expired the right to make the patented article passes to the public. Said Chief Judge Cullen:

"Its [the inventor's] situation was at least no better than if it had never obtained patents, and in such a case, as stated by Judge Vann in *Tabor v. Hoffman* (118 N. Y. 30): 'As the plaintiff had placed the perfected pump upon the market, without obtaining the protection of the patent laws, he thereby published that invention to the world and no longer had any exclusive property therein.' * * * In *Cooke & Cobb Co. v. Miller* (169 N. Y. 475) it was said: 'In the absence of some restriction upon the defendants arising out of the patent law, * * * the defendants had the right to manufacture and sell the article in question, although it was similar in general appearance and made from the same material and upon the same plan as the article made and sold by the plaintiff.' The evidence tends to show that the details of plaintiff's tool which the defendant copied were features or elements of the tool itself and therefore within the defendant's right to reproduce."

In *Montegut v. Hickson*, 178 App. Div. 94, the defendant, a dealer in gowns, procured another

person to misrepresent herself as a private customer and to purchase from another dealer gowns of the latter's exclusive design. Defendant then exhibited the gowns so acquired and sold them and copies of them to its customers. The majority of the Court held that an injunction would lie, but solely because "the deception employed was the very heart of the matter," Mr. Justice Shearn making the position of the Court clear when he said:

"I agree that the defendant has a legal right to copy and to sell as its own creations the exclusive models designed by the plaintiff, if the models or an inspection of the models are procured by fair means, but I deny the right of the defendant to obtain plaintiff's trade by resort to fraud and deception practiced upon the plaintiffs at the instigation and hiring of the defendant."

In the present case the petitioner occupied no contractual or fiduciary relation toward the respondent. It did not receive the information which was heralded on the bulletin boards and flaunted in the newspapers and published by the respondent's authority, confidentially or under the seal of secrecy. Whatever information it obtained it secured in common with others,—openly, publicly and notoriously. The newspapers which first published or bulletined the news furnished them by the respondent, committed no breach of contract, but acted in strict conformity with their express or implied agreement. Nor can there be any pretence that the petitioner wrongfully procured any member of The Associated Press to publish the news supplied by the latter in violation of the terms of the contract between such member and the respondent.

It is significant that the by-laws of the respondent place no limitations upon the use to be made of the news furnished by it to its members, except those contained in Article VII and VIII, and which show that the issuance of the newspapers of the several members is referred to as "the publication of the news of the Associated Press." (*Rec.*, pp. 172, 173):

Were any proof necessary to sustain so obvious a proposition as that for which we contend, the quotations made from the bill of complaint and from the by-laws of the respondent, *supra*, demonstrate that there is no provision in its charter or by-laws to the effect that news gathered by it shall remain confidential and secret until its publication has been fully accomplished by all of its members. Such a provision would be preposterous on its face and devoid of all potency.

But even had the charter and by-laws contained such a provision, it could not possibly have bound the public, for it was not a party to any such arrangement or agreement. It did not receive the news as a confidential communication, or as a secret, or as impressed with a trust. Nor was the news when communicated subject to any limitation affecting the use to be made of it. When the bottle which contained it was uncorked, the news like the Genie of the Arabian fable pervaded the entire atmosphere and could not be bottled up again.

The Respondent's Contentions.

It is, however, urged that, because the petitioner is seeking to make use of the news thus published with the respondent's consent, for its own

profit and in competition with the respondent, a legal wrong has been inflicted against which a court of equity will grant redress.

Assuming, but not conceding, that the respondent, which alleges that it is not organized for profit, has sustained damage, where is the *injuria* to be found? What principle of law has been violated? What property right has been infringed, when the petitioner has only taken that which it was the right of anybody and everybody to take who had access to the newspaper or to the bulletin board by which the news which the respondent calls its own, was spread broadcast? Where is the precedent for such a cause of action? It is not to be found in the case of the inventor, or the architect, or the artist, who originates ideas which, in the absence of statutory protection, may be imitated, copied or appropriated, by whosoever pleases, to enjoy pecuniary or other profit from the use to be made of the copied creation.

While it is true that the want of a precedent is not necessarily a sufficient reason for turning a plaintiff out of court, yet the fact that no precedent can be found to sustain an action in any given case, is cogent evidence that a principle does not exist upon which the right may be based. As was said by Chief Judge Parker in *Roberson v. Rochester Folding Box Co.*, 171 N. Y. 538, there must

“be found a clear and unequivocal principle of the common law which either directly or mediately governs it or which by analogy or parity of reasoning ought to govern it.”

Such a principle, it is asserted by the petitioner, is to be found in the formula contained in the

opinion of Judge Hough rendered in the Circuit Court of Appeals in this case that

“it is reasonable and just that each member of plaintiff and plaintiff itself has a property right in this news until the reasonable reward of each member is received, and that means (with due allowance for the earth’s rotation) until plaintiff’s most western member has enjoyed his reward, which is, not to have his local competitor supplied in time for competition with what he has paid for.”

That is rather the statement of a conclusion than of a reason. It is the more extraordinary in that it confounds the corporation and its members. We are not concerned with eastern members or with western members, with their profits or their losses, with their advantages or their disadvantages. The rights of the parties to this action are not dependent on the accidental or geographical distribution of their members or subscribers. The Associated Press as a corporate entity brings this action and not its members. Their relation to the corporation is practically the same as that of a stockholder in a business corporation. The individual interests of such a stockholder cannot be enforced in an action brought by the corporation. The corporate entity can only enforce a cause of action which pertains to the entity as such, and not one based on considerations that are applicable to the individual stockholders or members. Nor can the latter maintain an action based upon rights accruing to the corporation, save in exceptional cases which are adequately safeguarded by the authorities.

United Copper Securities Co. v. Amalgamated Copper Co., 244 U. S. 261.

Judge Hough disregarding this elementary concept of a corporation, laying stress on the fact that respondent is a membership corporation says (*Rec. p. 197*):

“The rights of members whether printing in Duluth or Galveston, New York or San Francisco, are equal, and the aggregate of their rights is the plaintiff’s rights.”

This is indeed a novelty in corporation law. It regards as identical the corporation as a single unit and the independent units constituting its stockholders or membership—the independent contractual rights of the several stockholders and members and the rights of the corporation as an entirety. The results of such a doctrine can well be imagined when one considers that the Membership Corporations Law of New York (Laws of 1909, Ch. 40, constituting Chapter 35 of the Consolidated Laws) includes among others Cemetery, Hospital, Agricultural, Library and Alumni Corporations, Social Clubs, Christian and Bar Associations, Medical Societies, Boards of Trade, Horse Breeding Associations and Bridge Companies.

The extent of the respondent’s contention is indicated by its interpretation of the decree rendered in pursuance of the decision of the Circuit Court of Appeals, as shown by the notice which it immediately served on the petitioner (*ante p. 7*). It asserted ownership not only of all despatches published in newspapers shown upon the list furnished, credited to the respondent or not otherwise credited, but also to the local news published in such newspapers which had been collected and published by such newspapers. Accordingly every one of the nine hundred and fifty or more newspapers that belong to the respondent’s

combination, not one of which is a party to this suit, in effect is claimed to have obtained an injunction against the use of its news by the petitioner.

It is true that the petitioner cannot be heard, nor will it be enabled to present its defenses to such a contention, yet, without further legal sanction than the fact of membership by the owners or representatives of such newspapers in the respondent, the local news published by them respectively is likewise adjudged to survive publication and is claimed to have received the quality of private property, in the very face of its surrender to the public by each of them separately.

Thus, for example, if the New York Times were to publish news concerning an event of a local character, the fact of its membership in the respondent would, according to the latter's theory, at once preclude the petitioner, and by the same token, any of its subscribers, from publishing such news "until its commercial value as news to the complainant and all of its members has passed away."

Reductio ad absurdum could not go to further lengths. This would fasten upon the country a most dangerous and intolerable monopoly, since no newspaper can become a member of the respondent unless (1) by the affirmative vote of four-fifths of all of the nine hundred and fifty more members or (2) by the vote of the board of directors with the unanimous consent of all of the members in the locality in which the applicant for a franchise is established. The latter are given "a right of protest," which means that any member having this right may exclude a competitor or would-be competitor from membership. Since no person not a member can secure the news

service of the respondent otherwise than through membership, the absolute domination over the news of the country by the respondent, should it succeed in its present contention, is demonstrated.

As has been seen, the respondent's argument has been largely based on the theory that The Associated Press is a membership corporation and that every member is entitled to realize the full value of the news and "to its own return for its own contribution to the co-operative product." The newspapers are not, as such, members. There is, therefore, a manifest hiatus in the argument. But even if each of the members were a newspaper, that would not affect the legal aspects of the case. As a member it would occupy the same status as the stockholder of a business corporation. Membership is merely an equivalent, so far as rights within the corporation are concerned, of the rights possessed by an ordinary stockholder.

Let us reverse the situation and assume that this action had been brought by the petitioner against the respondent for making use of the news gathered by the former. Could it be claimed that, until every stockholder and subscriber of the International News Service had realized the full value of the news, The Associated Press and its several members could not avail themselves of the information published in the newspapers of the various stockholders and subscribers of the petitioner? Surely the legal principle which is to determine this litigation cannot be made dependent on the form of incorporation of the news agency which collects and distributes the news. But, stripped of all verbiage, that is the doctrine for which the respondent has contended.

But considering the formula enunciated in the opinion of Judge Hough more closely, it will be found that it loses sight of the principles which we have discussed and of the decisions in which the nature of the respondent's property right and its limitations are considered. Not oblivious to those authorities the Court is driven to the criticism that the petitioner lays improper stress upon the fact of "publication" and to the contention that there can be no "publication" of the news collected by the respondent, until each of its 950 members has been enabled, if he so chooses, to publish it in a newspaper owned or controlled by him. In like manner it is asserted that the news printed in each of the 950 newspapers, and originating with them, cannot be said to have been published until an opportunity has been afforded to each of the 950 co-operating newspapers to publish such news of local origin. This is certainly a startling proposition, which, if adopted, would result in extraordinary consequences and disturb well settled legal principles.

The connotation of "publication" announced in the opinion, varies materially from that which was given to it at the instance of the respondent in *Tribune Co. of Chicago v. Associated Press*, *supra*.

It likewise disregards the lexicographers who define "publication" as the act by which a thing is made public, or is given publicity, as well as the authorities which have adopted that definition.

LeRoy vs. Jameson, 15 Fed. Cas. 373, 376.

United States vs. Williams, 3 Fed. Rep. 484, 486.

United States vs. Comerford, 25 Fed. Rep. 902, 903.

D'Ole vs. Kansas City Star Co., 94 Fed. Rep. 840, 842.

Hale vs. Grey, 21 Nev. 278; s. c. 19 L. R. A. 134.

Sproul vs. Pillsbury, 72 Me. 20, 21.

Judge Hough argues (*Rec. p. 199*):

"We have assumed the newspaper first printing [not] to be copyrighted, and no doubt its publication of its early edition was a general publication; but it could not copyright, abandon nor destroy what it did not own; and it did not own plaintiff's property, in the news, nor that of its own fellow-members in California. It did own the right to print in New York, but we discover no magic in the word 'publication' which takes away or terminates the rights of others."

This statement involves two patent fallacies: 1. a disregard of the conceded fact that the newspaper publications referred to occurred with the express and unqualified consent and authority of the respondent; 2. an obliviousness to the fact that this is a controversy solely between the petitioner and the respondent, to which neither the latter's members, nor the petitioner's subscribers are parties. There is no claim that the newspapers publishing early editions had any right save that of publication derived solely from the respondent. But that right was plenary and when exercised, as it was, in conformity with the by-laws of the respondent, was the act of the latter to all intents and purposes, and constituted an authorized publication by the owner of the news. So far as the fellow-members of the first publisher were concerned they could not demur because every one of them recognized and

possessed such right of publication. But even if he did not the fact is immaterial. The legal consequences flowing from publication cannot be obviated by injecting elements entirely foreign to the controversy or by indulging in an *ad captandum* argument.

The respondent's argument proceeds on the theory that its property right in the news which it gathers continues until its full commercial news value has been utilized. Then, apparently, it is conceded that it no longer exists. Judge Hand indicated that the newspapers that are not affiliated with the respondent can receive the news

"from a rival agency within three or four hours, which ought to be sufficient time to protect the business interests of the news service that first acquired it" (*Rec. p. 187*).

Why the property right in the news should cease after it has been utilized, assuming that it survives publication, or why its existence as a right should be measured by the arbitrary term of "three or four hours", it is difficult to understand. If news is private property of such a nature that publication does not convert it into public property then how does it cease to be private property by the mere circumstance that at some defined or undefined period its value as news has diminished or vanished?

A property right is not dependent upon its commercial value. If it is only worth a farthing, it still is property. To the man in the Blue Ridge or the Ozark Mountains, or in the Adirondack Forest or the Everglades, or in Alaska, news gathered today may continue to be news six months hence. It would seem, therefore, logically to follow from the respondent's reasoning, that no publication, however general, can destroy the prop-

erty of the collector of news in the information that he has gathered. Such a conclusion presents a striking contrast with the doctrines applicable to authors, inventors and artists who have imparted their embodied conceptions to the public without seeking the statutory protection by which alone they can retain a property right in their intangible conceptions after publication.

It does not suffice as an answer to say that the collection of news requires an organization with capital and large expenditures. The author, the inventor and the artist devote years of time and often large expenditures of money to cultivate and ripen their intellectual product. It is a result not only of training and talent, but also of that infinite capacity of taking pains which has been said to constitute genius. The inventor may have expended all of his pecuniary possessions in experiments and in procuring mechanical assistance before he has finally attained his goal. Yet the property rights of the author, the inventor and the artist, superior in quality, more lasting in benefit and advantage to the world than the intelligence gathered by a news agency, are lost by a publication of just such a character as that which is now under consideration.

The property right in the conceptions of a Shakespeare or of a Milton; of a Scott or a Dickens, of an Edison, a Westinghouse or a Marconi, would, under the law, be lost to him and would become public property without his gaining his reward, by the mere act of publication, whilst it is claimed that a mere news gatherer can permit the publication of his property with impunity until he has realized from it whatever he may consider to be its commercial value. This is a strange incongruity. It is not explained by the comment

that the news item is worthless as literature. That is tantamount to saying, that legal protection is dependent on the lack of literary merit. Gibbon, Grote, Macauley, Prescott and Parkman would have lost the property right inhering in their classic historical compositions, by publication without securing a copyright, whilst the ephemeral news of the day would continue to retain its character of private property though published a millionfold.

The ultimate reason on which this exceptional property right is sought to be grounded, is said to be found in the ponderous phrase, coined by one of respondent's counsel, "the right to the precommunicatedness of the news." The idea is as novel as the word which has been invented to express it. But, like many phrases, it has more of sound than of meaning. Is it possible that one who learns of a railway accident or of the death of a crowned head, or of a convulsion of nature in the Caribbean Sea, has a property right in this information which is superior to the right of "precommunicatedness" of "Huckleberry Finn" or "Evangeline," of "Joseph Vance" or "Lorna Doone," or of the telegraph, the telephone, the phonograph or the submarine? The obvious difficulty in finding apt language in our ordinary vocabulary to point out the distinction does not create it. The invention of a sesquipedalian and unpronounceable symbol can only mystify. It does not explain.

Review of Authorities Relied on by Respondent.

We assert with much confidence, that there is nothing in any of the authorities upon which the courts below and the respondent have relied that

will sustain the reasoning on which their conclusion rests; but, on the contrary, practically every one of the cases to which reference has been made strengthens the petitioner's contention. We shall proceed to enumerate them:

Caird v. Sime, L. R. 12 App. Cas. 326.

There it was held that a professor who delivers lectures in his classroom does not dedicate them to the world so as to entitle any one to publish them without his permission. Lord Halsbury regarded such a delivery as not equivalent to a communication of them to the public at large, since it was only "to a limited class of students." His opinion, however, contains this pregnant remark:

"If by it [the word 'lecture'] is signified a lecture delivered on behalf of the University, and, so to speak, as the lecture of the University itself, as the authorized exposition of the University teaching, I can well understand that by the nature of the thing, from the circumstances of its delivery, and the object with which it was delivered, it would be impossible to say that it was intended by those on whose behalf the professor was lecturing or by himself to limit the right of communication to others. Whether that limitation of the right arises from the implied contract or from the existing relation between the hearers and the author, *it is intelligible that where a person speaks a speech to which all the world is invited, either expressly or impliedly to listen, or preaches a sermon in a church, the doors of which are thrown open to all mankind, the mode and manner of publication negative, as it appears to me, any limitation.*"

Lord Watson said (pp. 343, 344):

"The author of a lecture on moral philosophy, or of any other original composition,

retains a right of property in his work which entitles him to prevent its publication by others until it has, with his consent, been communicated to the public. Since the case of *Jeffreys v. Boosey*, 4 H. L. C. 815, was decided by this House in the year 1854, it must be taken as settled law that, upon such communication being made to the public, whether orally or by the circulation of written or printed copies of the work, the author's right of property ceases to exist. Copyright, which is the exclusive privilege of multiplying copies after publication, is the creature of statute, and with that right we have nothing to do in the present case. The only question which we have to decide is, whether the oral delivery of the appellant's lectures to the students attending his class is, in law, equivalent to communication to the public.

"The author's right of property in his unpublished work being undoubted, it has also been settled that he may communicate it to others under such limitations as will not interfere with the continuance of the right. *

* * *On the other hand I do not doubt that a lecturer who addresses himself to the public generally without distinction of persons or selection or restriction of his hearers has, as the Lord President observes in this case, 'abandoned his ideas and words to the use of the public at large, or in other words has himself published them'.*"

Lord FitzGerald went much further and was of the opinion that the delivery of a lecture to a class of students was a publication to the public at large.

Tompkins v. Halleck, 133 Mass. 32.

There a play which had never been printed was presented on the stage. A spectator who attend-

ed a public representation and who wrote down the play from memory and then sought to present it himself, was restrained from staging it. The Court expressly limited its decision to the rights of "the proprietors of *unpublished* plays." Mr. Justice Devens said:

"That the right of property which an author has in his works continues until by *publication* a right to their use has been conferred upon or dedicated to the public, has never been disputed. *If such publication be made in print of a work of which no copyright has been obtained, it is a complete dedication thereof for all purposes to the public. Wheaton v. Peters, 8 Pet. 591, Stevens v. Gladding, 17 How. 447.*"

Palmer v. DeWitt, 47 N. Y. 532, involved a similar question and a like result was reached. But in the course of his opinion Judge Allen said:

"The author of a literary work of composition has, by law, a right to the first publication of it. He has a right to determine whether it shall be published at all, and if published, when, where, by whom, and in what form. This exclusive right is confined to the first publication. *When once published it is dedicated to the public*, and the author has not, at common law, any exclusive right to multiply copies of it or to control the subsequent issues of copies by others. * * * *Until published*, the work is the private property of the author, wherever the common law rights of authors are regarded. *When once published, with the assent of the author, it becomes the property of the world*, subject only to such rights as the author may have secured under copyright laws, and they can have no force or give any rights beyond the territorial limits of the government by which they are enacted."

Ferris v. Frohman, 223 U. S. 424.

This case likewise related to the public representation of a dramatic composition not printed and published, which was held not to constitute an abandonment of it to the public use. Emphasis was, however, given to the fact that the play had not been printed and published.

Mr. Justice Hughes said:

“The present case is not one in which the owner of a play has printed and published it and thus, having lost his rights at common law, must depend upon statutory copyright in this country. The play in question has not been printed and published.”

Dodge Co. v. Construction Information Co.,
183 Mass. 62.

There the plaintiff furnished its subscribers daily, either orally, in writing, or in print, information in regard to the erection of buildings and the construction of public works, under contract signed by each subscriber to use the reports in strict confidence and for his business only. The defendant sought to make use of information which it surreptitiously and unlawfully acquired from plaintiff's subscribers. An action was sustained, but solely on the ground of the unlawful methods pursued by the defendant. Chief Justice Knowlton said:

“The plaintiff has it [the information] and the defendant does not have it. If the defendant can obtain it legitimately, he becomes the owner of the same kind of property, and the two may become competitors in the market as vendors to those who are willing to pay for it. But if the defendant surreptitiously and against the plaintiff's will takes from the plaintiff and appropriates the form of expression which is the symbol of the

plaintiff's possession, and thus, by direct attack, as it were, divides the plaintiff's possession, and shares it, this conduct is a violation of the plaintiff's right of property. * * *

The next question is whether the giving of information by the plaintiff to its subscribers is a publication of it, such as dedicates it to the public and deprives the plaintiff of its right of control. It is well established that the *private* circulation of information or literary composition, in writing or in print, for a restricted purpose, is not a publication which gives the public a right to use it."

Jewelers' Mercantile Agency v. Jewelers' Publishing Co., *supra*, was cited and distinguished on obvious grounds.

Weyckmeister v. American Lithographic Co., 134 Fed. Rep. 321.

That was an action to restrain the infringement of a copyright on Sadler's painting entitled "The Chorus". The defendant pleaded an exhibition of the painting at the Royal Academy at London as a publication thereof. It appeared that the exhibition, except as to members of the Academy and the exhibitors and their families, was on the conditions of the payment of an entrance fee and that no permission to copy works during the exhibition could be granted. The decision was based on the principle laid down in *Caird v. Sime*, *Tompkins v. Halleck* and *Palmer v. DeWitt*, *supra*, Judge Townsend saying:

"A limited publication of a subject of copyright is one which communicates a knowledge of its contents under conditions expressly or impliedly precluding its dedication to the public. * * * The nature of the property in question in large measure determines the

extent of the public right. Thus, in case of a book, ordinarily the sole practical benefit to the author is in the right to multiply copies. The exhibition or private circulation of the original or of printed copies is not a publication, unless it amounts to a general offer to the public. The unrestricted offer of even a single copy to the public implies the surrender of the common law right. * * *

In the case at bar not only was there no presumption of a right to copy, but there was an express denial of such right. *Whether said exhibition would have amounted to a publication in the absence of any such prohibition is immaterial to the disposition of this case, and upon that question we express no opinion.*"

When the case came before this Court, *sub nom. American Tobacco Co. v. Werckmeister*, 207 U. S. 284, Mr. Justice Day said:

"In this case it appears that paintings are expressly entered at the gallery with copyrights reserved. There is no permission to copy; on the other hand, officers are present who rigidly enforce the requirements of the society that no copying shall take place.

Starting with the presumption that it is the author's right to withhold his property, or only to yield to a qualified and special inspection which shall not permit the public to acquire rights in it, we think the circumstances of this exhibition conclusively show that it was the purpose of the owner, entirely consistent with the acts done, not to permit such an inspection of his picture as would throw its use open to the public. *We do not mean to say that the public exhibition of a painting or statue, where all might see and freely copy it, might not amount to publication within the statute, regardless of the artist's purpose or notice of reservation of rights which he takes no measure to protect.* But

such is not the present case, where the greatest care was taken to prevent copying."

Exchange Telegraph Co., Ltd. v. Gregory & Co., L. R. (1896) 1 Q. B. 147.

There the plaintiff was a telegraphic news agency, which collated stock quotations and distributed them to subscribers under a contract that the intelligence furnished by the company should not be sold or communicated to non-subscribers, for a pecuniary consideration or otherwise. The defendant, who knew the terms of the contract, wrongfully induced one of the plaintiff's subscribers to break its contract and thus surreptitiously acquired the plaintiff's quotations and published them, to the plaintiff's injury. In that case there was no publication by the plaintiff, the quotations were supplied under conditions of trust and confidence, and the defendant committed a tort in wrongfully inducing the subscriber to commit a breach of his contract.

Exchange Telegraph Co. v. Central News Co., Ltd. L. R. (1897) 2 Ch. 48.

There the plaintiff collected news regarding horse races, which it distributed among its subscribers on the condition that it was to be used only in the newspaper, or posted only in the club, news room, office, or other place at which it was delivered, and that no copy of it should be made for any other purpose than for such publication, and was not to be communicated to any other person, nor assigned in whole or in part to another. It was held that the court would interfere by injunction to restrain a subscriber from communicating such information to a third party in breach of such contract and to restrain the

third party from inducing the subscriber to break his contract by supplying him with such information with a view to publication. In the course of his opinion Mr. Justice Stirling said:

"It was said, however, in the present case, that all persons who received information through the plaintiff's machine were not, or might not be, under an obligation to abstain from publishing it. It was pointed out that the news was supplied by the plaintiff to clubs, news rooms, and hotels for the purpose of being posted up there, and it was said that messages received at Panton Street (that being the defendant's office) might have come from some person who had lawfully acquired it at some such place and was at liberty to use it as he saw fit. I think it possible that such persons might exist, but I also think that on the evidence before me I ought not to come to the conclusion that such a person sent these messages to Panton Street."

Kiernan v. Manhattan Quotation Telegraph Co., 50 How. Pr. 194.

There The Associated Press turned over to the plaintiff foreign financial news collected by it. The plaintiff furnished the news to his subscribers and made no general publication. The defendant obtained all its financial news through one Abbott, who copied it from the manifold slips furnished by the plaintiff to his customers. It was held that the transmission of the quotations to subscribers over telegraphic printing instruments was not a general publication. Mr. Justice Van Brunt said:

"To say that the Associated Press could not restrain the publication of its dispatches

by any person who should surreptitiously obtain them would be to hold that no private individual could prevent the publication of his own private dispatches if they should happen to relate to public events. It seems to me clear, therefore, that there is a right of property which will be protected by the court, in the news collected by the Associated Press abroad and telegraphed to it by its agents, so long as that right is not abandoned by publication; and as Mr. Kiernan has succeeded to the rights of the Associated Press, so far as relates to 'foreign financial news,' he is entitled to protection in the use of that news, *unless he abandons it by publication.* * * * Does the plaintiff abandon such right by transmitting such news to his customers? *If such transmission amounts to a general publication then it is clear that all rights of the plaintiff are lost."*

After citing *Palmer v. DeWitt*, *supra*, and *Woolsey v. Judd*, 4 Duer, 485, the opinion proceeds:

"Applying this principle to the case now under consideration, it is evident that if Mr. Kiernan transmitted his foreign financial news to his customers, for their information, by means of manifold slips exclusively, *he could restrain the publication by these persons of such intelligence.* Is there any difference in principle because he writes to his customers by telegraph? I am unable to see any distinction."

National Telegraph News Co. v. Western Union Telegraph Co., 119 Fed. Rep. 294.

The appellee gathered information as to current events, such as the results of races, games and market quotations, which it distributed to its customers by tickers, under a contract which is indi-

ated to have been similar to the one set forth in *Illinois Commission Co. v. Cleveland Telegraph Co.*, 119 Fed. Rep. 301, which was decided concurrently. The Western Union Company supplied its patrons with the information for restricted use at its place of business and not elsewhere, and for a limited purpose. The defendant appropriated the news appearing upon the appellee's ticker tape and circulated the news over its own wires and tickers to its own patrons. It defended its action by the contention that, upon the appearance of the printed tape upon the appellee's tickers in the places of business of the latter's patrons, there was such a publication as amounted to a dedication of the contents of the tape to the public. It was obvious, however, that the information given by the appellee to its patrons, for a limited use only was not to be communicated to the public generally, and, under the terms of the contract pursuant to which the news was furnished, was under no circumstances to be communicated to any other news distributing company.

*Board of Trade of Chicago v. Christie Grain
& Stock Co.*, 198 U. S. 236.

There the plaintiff collected quotations of the prices offered and accepted for produce in its exchange, which it distributed to subscribers under a contract which confined the information conveyed within a circle of persons, all contracting with the Board of Trade. Each of them was under contract to receive the information for his own use only, which bound him not to make it public. The defendant refused to sign a contract of the character required and obtained the quotations in some way not disclosed, but necessarily in a surreptitious manner. It was

held that the plaintiff was entitled to an injunction to restrain the defendant from availing itself of these quotations. The ground of the decision is stated by Mr. Justice Holmes thus :

“In the first place, apart from special objections, the plaintiff’s collection of quotations is entitled to the protection of the law. It stands like a trade secret. The plaintiff has the right to keep the work which it has done, or paid for doing, to itself. The fact that others might do similar work, if they might, does not authorize them to steal the plaintiff’s. The plaintiff does not lose its rights by communicating the result to persons, even if many, in confidential relations to itself, under a contract not to make it public, and strangers to the trust will be restrained from getting at the knowledge by inducing a breach of trust and using knowledge obtained by such a breach.”

The cases relied upon are those which have been discussed *supra*.

Judge Ward, in his dissenting opinion in the present case, makes the following lucid comment, which distinguishes this from the *Christie* case (*Rec. p. 202*) :

“The Supreme Court in the *Christie* case likened property in news to property in trade secrets. The two are strikingly similar. The owner of a trade secret will be given protection against any breach of confidence in respect to it by his employees and against any dishonest discovery of it by third parties. If, however, he communicates the secret to another without condition or if any one by his own efforts, for instance by analysis of a secret compound, learns how it is made, such persons may use it without any accountability to the original discoverer. That the discoverer spent much time and money in discovering the secret would not be regarded as a

reason why such persons learning it honestly should not make use of it.

"In this case the complainant furnishes news to its members for the express purpose of their putting it on their bulletin boards and issuing it to the public in their newspapers. This is what they live on. After this it seems to me pure fiction to say that any property in the distributor survives. Everything in the nature of a confidence about the communication has ceased."

To this might be added what Judge Vann said in *Tabor v. Hoffman*, 118 N. Y. 36:

"If a valuable medicine, not protected by patent, is put upon the market, any one may, if he can by chemical analysis and a series of experiments, or by any other use of the medicine itself aided by his own resources only, discover the ingredients and their proportions. If he thus finds out the secret of the proprietor, he may use it to any extent that he desires without danger of interference by the courts. But, because this discovery may be possible by fair means, it would not justify a discovery by unfair means, such as the bribery of a clerk, who in the course of his employment had aided in compounding the medicine and had thus become familiar with the formula."

Where, however, every element of secrecy is removed by the voluntary act and consent of the possessor of what may originally have been a trade secret, the right to make use of the information once secret, but which has ceased to be so, must be unlimited. To apply the doctrine relating to trade secrets to news printed in a newspaper of general circulation, is an inconceivable anomaly. Secrecy ends where publicity begins, and in the present case publicity was unmistakably intended.

Francis v. Campbell, 68 App. Div. 287, also illustrates the principle for which we contend.

*Board of Trade of Chicago v. McDermott
Commission Co.*, 143 Fed. Rep. 188.

This case is similar to those above enumerated and related also to the furnishing of quotations for use by patrons, and not for publication. The Court there said:

“It is quite apparent that the purpose of such posting is for the benefit of those who subscribe for and have the lawful right to use such quotations, and their patrons, and to invite further trade, and not for the benefit of competitors or the general public.”

Board of Trade v. Tucker, 221 Fed. Rep.
305.

Board of Trade v. Cella Commission Co.,
145 Fed. Rep. 28.

Board of Trade v. Kinsey Co., 130 Fed.
Rep. 507.

All of these cases are governed by the principle of the *Christie case*. In each of them the information was communicated to the complainants patrons for a limited purpose and was used by the patrons for that purpose. The defendant in each case acquired the quotations surreptitiously and did not acquire them from one authorized to make public sale of the information.

Fonotipia, Limited, v. Bradley, 171 Fed.
Rep. 951.

That case arose in the Circuit Court for the Eastern District of New York. The proofs showed that the complainants manufactured phonograph records which consisted of flat and cir-

cular discs used for the reproduction of sound. Each record was made from an original matrix, upon which were registered musical productions, of high artistic merit, by singers and performers, who were paid large sums by the complainant for their services in creating the records. A corporation which the defendant represented, made copies of the complainants' records and sold them at prices much below those charged for the original records. He issued advertisements in which he claimed that the records themselves were "pressed upon the very highest class of material, *finished equal to the original*," *that the character of the record itself was identical with the original record*, "and that experts who have listened to samples are unable to determine between the original and the copy." The catalogue contained a statement that the records offered by defendant "*are all duplicates from the original records made by the artists whose names are used herein*."

On this state of facts Judge Chatfield said:

"If the defendant is selling to customers records reproduced by processes of the Continental Record Company by means of discs purchased in the market by that company for the purpose, and if he advertises and guarantees to his customers that the Continental records are duplicates equal in all respects, including composition and finish, and that it is impossible to distinguish between the Continental records and those produced by the complainants, we have a question of fact presented in which the public is interested, namely, do the records submitted as evidence in the case lead to any determination upon the question of deception or imitation of the product and the resultant benefit to the imitator, with corresponding injury to the imitated, by the results of the sales, and by the effect upon future sales if the product of the imitation be unsatisfactory?"

After discussing various authorities the opinion concludes:

"It cannot now be determined how far such appropriation of ideas could be prevented; but it would seem that where a product is placed upon the market under advertisements and statements that the substitute or imitation product *is a duplicate of the original*, and where the commercial value of the imitation lies in the fact that it takes advantage of and appropriated to itself the commercial qualities, reputation and salable properties of the original, equity should grant relief."

Prest-O-Lite Company v. Ray, 220 N. Y. 522.

Searchlight Gas Co. v. Prest-O-Lite Co.,
215 Fed. Rep. 694.

The first of these cases was brought to recover a penalty prescribed by the New York General Business Law, for an infringement of a trade-mark. The question to be determined was stated by the Court to be, whether the plaintiff had a trade-mark in the name "Prest-O-Lite" or whether the name had been so connected and identified with a steel tank for the storage of acetylene gas as to become generic and free to public use upon the expiration of the patents covering the tanks. The Court reached the conclusion that the name used was more than a name for an article of manufacture or of a holder containing gas. It included a utility and a right, the one manufactured by the plaintiff and the other established by its method of business. The name, therefore, being associated with the plaintiff as the manufacturer, was regarded as a valid trade-mark.

In the second of these cases, which likewise involved the right to use the name after the expiration of the patent covering the tank used for the storage of acetylene gas, the Court said:

"While service is not trade in articles of commerce, and while trade-marks, as such, must actually be put upon articles of commerce or their containers, we see no reason why an intending servitor may not offer his service under an arbitrary name or sign as well as under his real name. And the ultimate fact of importance is that in the automobile world Prest-O-Lite came to stand, not only for the physical article, but also for the incorporeal right to serve and be served."

II.

None of the elements of unfair competition are to be found in this case.

The respondent had no ownership in the facts to which the news which it collected may have related.

Davies vs. Bowes, and Tribune Co. vs. Illinois Pub. & Ptg. Co. (supra).

The petitioner did not in any way sail under false colors. It did not pretend that the news which it distributed was that of the respondent. On the contrary, the complaint proceeds upon the very converse of that theory. In paragraph X (*Rec., p. 12*) it is alleged that

"ever since the organization of the defendant it has constantly and continuously engaged in the practice of obtaining * * without any substantial expense to itself news

which the Associated Press has published * * and appropriating the said news and * * selling and transmitting such news to its own clients *as if the same had been gathered by its own independent efforts and at great expense and from its own original sources of information.*"

Nor did the petitioner resort to any of the methods that have been denounced as constituting unfair competition. It did not engage in defamation of the respondent, or disparagement of the news collected by it. It made no misrepresentations or false claims. It did not resort to intimidation of the respondent's members by threats of any kind. It participated in no combination to prevent the respondent from acquiring news or from distributing it. It did not interfere with any of the respondent's members or patrons, or make a contract for the exclusive right to supply its news to those with whom it dealt. It did not pass off its news as that of the respondent. There is no element of imitation, no false pretence, no fraud. Nothing has been done to mislead the public. In a word, it resorted to none of the methods which are dealt with in the rapidly growing literature relating to unfair competition.

McLean v. Fleming, 96 U. S. 245.

Laurence Mfg. Co. v. Tennessee Mfg. Co.,
138 U. S. 537.

Coats v. Merrick Thread Co., 149 U. S. 562.

Elgin Natl. Watch Co. v. Illinois Watch Co.,
179 U. S. 675.

Chief Justice Fuller in *Howe Scale Co. v. Wyckoff, Seamans & Benedict*, 198 U. S. 118, 140, laid down the controlling principle thus:

"The essence of the wrong in unfair competition consists in the sale of the goods of one manufacturer or vendor for those of another, and if defendant so conducts his business as not to palm off its goods as those of complainant the action fails."

In *Diamant v. Lewis*, 144 Iowa, 509, 517, the same idea was expressed:

"The doctrine of unfair trade amounts to no more than this: One person has no right to sell goods as the goods of another, nor to do his business as the business of another, and on proper showing will be restrained from so doing. In other words to constitute unfair competition there must be representations or conduct which deceive the public into believing that the business, name, reputation or good-will of one person is that of another."

In the English decisions this is described as "passing off" or attempting to pass off upon the public the goods of one for those of another.

In the French law the equivalent "concurrency déloyale" consists in the creation of confusion between the products of two manufacturers or merchants or of casting discredit on a rival establishment.

No courts have thus far extended the doctrine of unfair competition to a case where there is no element of deception, misrepresentation or confusion or of sailing under false colors.

The rule applied in *Singer Mfg. Co. v. June Mfg. Co.*, 163 U. S. 169, 185, to an expired patents or copyright is *a fortiori* applicable to a case where there has been no patent or copyright. The public has the right to make the machine or publish the book in the form in which it was constructed during the patent.

See also,

Dover Stamping Co. v. Fellows, 163 Mass 191.

Bamford v. Douglas Post Card Machine Co. 158 Fed. Rep. 355.

Judge Hough, recognizing this, substitutes epithet for authority, and harks back to his contention, that by taking news from the bulletins and newspapers published by the respondent's members, its property rights are infringed upon. That contention has been fully dealt with and has no relevancy to the subject now under discussion.

To say, therefore, that the use of news acquired by the petitioner in common with the general public from bulletins and published newspapers, and the distribution of it among the petitioner's patrons, is parasitic, immoral and unfair, leads nowhere. When all is said and done, it means only that the petitioner, when it sent out the news which it thus acquired, sent it out, not as another's news, but in its own phraseology and as its own. It made no claim that the news had been collected by another and does not seek business upon a false representation to that effect.

Judge Hough takes the position which is opposed to all authority that if petitioner had sold the news obtained from the early editions of newspapers,

“as obtained per Associated Press * * * since no deception would be wrought, no action for unfair competition would lie. * * *”
(*Rec.* p. 200).

That is to say, that if the petitioner should sell its news as that of the Associated Press it would not amount to unfair competition. Not having masqueraded under the name of the re-

spondent, that fact is made the basis of the charge of unfair competition!

Says Judge Hough (*Rev. p. 200*):

“When and if such Associated Press news is sold as the fruit of defendant’s own efforts and under its own name, it is a plain case of deception, assuming defendant’s customers to be honorable men anxious for good wares—an assumption necessarily made in the absence of evidence to the contrary.”

The petitioner’s subscribers, do not complain here. The truthfulness of the news which is disseminated is not questioned. So far as they are concerned its accuracy has been verified. Even assuming that the petitioner affirmatively stated to its patrons that it had collected the news in the first instance, what legal wrong has been done to the respondent by such a declaration? Certainly none that would give rise to a cause of action.

But it has made no representation of any kind. It purveys news that has come to it. No statement as to its origin or as to the identity of its informant is made or required. It has made no false pretence. It is not seeking to sell news by flying the respondent’s flag.

It is difficult to conceive how the respondent can contend that acts precisely like those which were charged against its predecessor in *Tribune Co. of Chicago v. Associated Press*, 116 *Fed. Rep.* 126, constitute unfair competition. They were held to be lawful when committed by it. What is it that converts the same acts, when charged against the petitioner, into *dolus* or unfair competition.

Nor is it clear how the reading by the respondent of the petitioner’s news, as published by its subscribers, and using it as a “tip” to be sent out to

respondent's members in the form of news, differs from the act charged against the petitioner. Judge Hand was unable to grasp the distinction (*Rec. pp. 183, 184*). A verified "tip" merely proves the trustworthiness of the information which constitutes the "tip." That information as to news published by the petitioner when duly verified by the respondent is nevertheless news gathered by the petitioner. When the verified "tip" is sent out to its members by the respondent it in reality disseminates for the benefit of itself and its members the petitioner's news. To pretend that it is anything else is the merest camouflage. It necessarily follows that unfair competition cannot be predicated upon a universal custom in which the respondent and all other news-agencies and newspapers participate.

If the petitioner is chargeable with unfair competition because it sells to its patrons information acquired from bulletin boards and newspapers maintained by respondent's members, then he who for profit and in competition with the inventor builds a machine or uses a process, or sells an article devised by one who fails to take out a patent or to ask for the allowance of sufficient or valid claims; or he who multiplies and sells for gain copies of a book or artistic production in competition with the author or painter who neglects to take out a copyright, or fails to conform to the statute regulating the granting of copyrights, is equally guilty of unfair competition. The charge of piracy, parasitism and immorality would apply to the latter as well. No court has, however, hitherto regarded such instances as presenting cases of unfair competition.

III.

The respondent having pursued as against the petitioner the same practices which it is now seeking to enjoin, has no standing in equity.

Whilst we strongly contend that the petitioner has committed no infraction of the respondent's property right by availing itself of the information afforded by the publication of news gathered by the respondent, if nevertheless such use constitutes a wrong, then the respondent is guilty of the same wrong. If it was wrong for the petitioner to utilize news published with the consent of the respondent, it was equally wrong for the respondent to utilize the news of the petitioner published by its subscribers. The act of both must be measured by the same yardstick. Both are equally at fault, or neither of them has done wrong. If both have acted contrary to law and good morals, then neither of them can be heard in equity, because of the principle that he who comes into a court of equity must come with clean hands. The pot will not be permitted to call the kettle black.

The opinion of Judge Hand, from which we have quoted, in our Statement of Facts (*supra*, pp. 16, 17) indicates his inability to differentiate between the act of one who reads a news item and rewrites it, and of another who treats the news item which he reads as a "tip," followed by going through the grotesque form of verification. Stripped of its mask, the latter act is the merest subterfuge. If it is in fact performed, it is merely a piece of comedy which approaches the farcical. It is worse; it is errant hypocrisy. The testimony collated (*ante* pp. 11 to 15) shows it.

In reality the "tip" consists of information of a news event acquired, as in the present case, from the petitioner. It is utilized by the respondent. The information, which is the news, is communicated by it to its members. They sell that information and thereby profit from the capital and expenditures made by the petitioner. What is the difference between the two methods, except a purely colorable one?

We therefore have a typical case of one wrongdoer who seeks relief from another when the first is himself committing a similar wrong against him from whom he is asking equitable relief. An unbroken line of authorities stands in the way of equitable intervention under such circumstances. Among many familiar decisions we cite:

Worden v. California Fig Syrup Co., 187 U. S. 516.

Manhattan Medicine Co. v. Wood, 108 U. S. 218.

Prince Mfg. Co. v. Prince's Metallic Paint Co., 135 N. Y. 24.

Thompson Co. v. American Law Book Co., 122 Fed. Rep. 922.

Uri v. Hirsch, 123 Fed. Rep. 568.

Nebraska Telephone Co. v. Western Independent Telephone Co., 95 N. W. Rep. 18.

Pittsburgh C. C. & St. L. Ry. Co. v. Town of Crothersville, 159 Ind. 330.

Fetridge v. Wells, 4 Abb. Pr. 144, approved in *Manhattan Medicine Co. v. Wood* and *Worden v. California Fig Syrup Co.*, *supra*.

In *Prince Manufacturing Co. v. Prince's Metallic Paint Co.*, *supra*, which was cited with ap-

proval in *Worden v. California Fig Syrup Co.*, *supra*, Judge Andrews said:

"The party who comes into a court of equity for relief against fraud must himself be free from fraud in the matter of which he complains, or, as is frequently said, he must come with 'clean hands'. The courts have in many cases applied this principle in bar of relief in cases of trade-marks. Any material misrepresentation in a label or trade-mark as to the person by whom the article is manufactured, or as to the place where manufactured, or as to the materials composing it, or any other material false representation, deprives the party of the right to relief in equity. The courts do not, in such cases, take in consideration the attitude of the defendant. Although the defendant's conduct is without justification, this in the view of a court of equity, affords no reason for interference. (See *Leather Co. v. American Leather Co.*, 11 H. L. Cas. 523; *Pidding v. How*, 8 Sym. 477; *Perry v. Truett*, 6 Bear. 66; *Partridge v. Menck*, 1 How. C. A. Cas. 558; *Manhattan Medicine Co. v. Wood*, 108 U. S. 218; *Palmer v. Harris*, 60 Pa. St. 156; *Kenny v. Gillet*, 70 Ind. 574.)"

In *Partridge v. Wells*, *supra*, the plaintiff, as a manufacturer of "The Balm of Thousand Flowers," sought to enjoin the defendant who was engaged in selling a similar article under the name of "The Balm of Ten Thousand Flowers." In neither concoction were any flowers used. Judge Duer said:

"Those who come into a court of equity seeking equity, must come with pure hands and a pure conscience. If they claim relief against the fraud of others, they must be free themselves from the imputation. If the sales made by the plaintiff and his firm are

effected, or sought to be, by misrepresentation and falsehood, they cannot be listened to when they complain that by the fraudulent rivalry of others their own fraudulent profits are diminished. An exclusive privilege for deceiving the public is assuredly not one that a court of equity can be required to aid or sanction. To do so would be to forfeit its name and character."

In *Thompson Co. v. American Law Book Co.*, *supra*, the maxim was applied in an action wherein the complainant asked for an injunction to restrain the defendant from pirating its literary property when it was itself guilty of similar acts, with respect to the property of others.

IV.

The decision of the Court of Appeals that all news collected by the respondent and by its several members remains after publication inviolate "until the commercial value of such news as news to the respondent and all its members has passed away", if sustained would result in assuring to the respondent the most intolerable monopoly.

The respondent does not regard itself as engaged in the business of supplying a public utility which is accessible on like terms to all who may choose to pay for its use, although it freely utilizes the instrumentalities of interstate commerce, such as the telephone and telegraph. Its service

is not available to any existing newspaper that may desire to avail itself of it nor to anyone not a member who may want to embark in the newspaper business. By its carefully guarded by-laws, which may or may not be lawful, the respondent has on the contrary painstakingly sought to restrict its service against such use. No newspaper can become a member or secure service against the so-called "right of protest" held by any member in a given community except by the affirmative votes of not less than four-fifths of the entire membership of one thousand and odd members.

As a result of this ingenious method of organization it is impossible to equip a new newspaper in any of the great cities with its service and without it such an enterprise would manifestly be incapable of surviving. The expense would be prohibitory, especially if, as this order provides, all news of the member papers of the respondent is to be and remain the property of the latter after publication "until the commercial value of such news as news to the respondent and all its members has passed away".

If the present contention is sound, it necessarily applies with equal force to protect every publication of local news made by every newspaper in the United States that happens to be a member of the Associated Press. It covers all news collected by every such paper by its own employees on its own account at its own expense, with which the Associated Press has nothing whatever to do, by virtue of the fact that the local member agrees that the Associated Press is entitled to the exclusive use of the news, and of that fact alone, it becomes immune from the rules

applicable to the publication of news to which it would otherwise be subject.

The order under review goes still further. It secures to the Associated Press the right at its own instance and on its own unsupported complaint to enjoin every other newspaper or purveyor of news from the use of the local news of each and all of its members (without even joining them as parties) with the collection of which it is in no way concerned, as though it were its own, and assumes absolute proprietorship of the news of all its members, and the Court below has sustained it in this position. Whatever defenses the Petitioner may have against such members if they had sued in their own right are rendered unavailable. Truly, a novel procedure!

If any such revolutionary rule is applicable to the Associated Press as a purveyor of news, it is equally and still more plainly applicable to every newspaper as to the news that it collects. A news item thus changes its heretofore universally recognized attitude of public property to that of inviolable private property "until its commercial use has expired"—whenever that may be. If a newspaper or magazine has a foreign as well as a domestic circulation there is no reason why, under this sweeping rule the news of a given fact that it happens to have secured and published should not for weeks thereafter remain private property.

Under this order it will be impossible for the Petitioner to know when the published news is available to it. It must determine at its peril when "its commercial value to the respondent *and its members* (scattered throughout the country and possibly in foreign countries for aught we know) has passed away". The Associated Press has alliances with the important European

news agencies for the interchange of news (*Rec. p. 17*). It may be and probably will be claimed that until in the course of weeks this news has been communicated to and utilized by them "its commercial value has not passed away." Why not?

V.

It is respectfully submitted that the injunction order to the extent that it was modified by the Circuit Court of Appeals should be reversed.

SAMUEL UNTERMYER,
LOUIS MARSHALL,
Petitioner's Counsel.

WILLIAM A. DEFORD,
Attorney for Petitioner.

APPENDIX.**Restraining Order Entered in District Court by Direction of Circuit Court of Appeals.**

UNITED STATES DISTRICT COURT.

SOUTHERN DISTRICT OF NEW YORK.

THE ASSOCIATED PRESS,
Complainant,

against

INTERNATIONAL NEWS SERVICE,
Defendant.

The appeal by the complainant from that portion of the order made by this Court on the 13th day of April, 1917, denying its application for an injunction, and the cross appeal by the defendant from the said order, in so far as it grants a writ of injunction restraining the defendant, having been heard by the Circuit Court of Appeals for the Second Circuit, and the mandate of the said Circuit Court of Appeals, bearing date the day of June, 1917, having been filed in the District Court for the Southern District of New York, in and by which mandate it appears that the order appealed from is modified and the cause remanded with directions to issue injunction in accordance with said opinion, the form of said order to be settled by the District Court; and due notice

of the settlement of the said order having been given by the complainant; after hearing counsel for both parties, it is hereby

ORDERED that the order of the Circuit Court of Appeals of the United States for the Second Circuit in the above entitled suit be and the same hereby is made the order of this Court, and that the order heretofore made by this Court be and the same hereby is modified and amended so as to read as follows:

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

THE ASSOCIATED PRESS,
Complainant,

against

INTERNATIONAL NEWS SERVICE,
Defendant.

In Equity,
No. E. 14-59

This cause having come on to be heard, and after hearing counsel for both parties, and it being established to my satisfaction:—

(1) That the complainant is a co-operative organization engaged in gathering from sources all over the world and distributing to its members and to newspapers represented by them all kinds of information, news and intelligence, telegraphic and otherwise, for publication in the said newspapers; that the defendant is a corporation engaged in a similar business for its own profit and

not as a co-operative organization; that the value of the service to each of the parties hereto to its members or customers largely depends upon the requirement that news which it collects shall be transmitted to its members and their newspapers earlier than similar information can be furnished to other competing newspapers, and that such news shall not be furnished to other newspapers than those of its members or customers, as the case may be, who co-operate in the expense of its work; that an essential part of the operation of the complainant and also of the defendant is that news collected by them shall remain confidential and not be sold or published by any rival news agency until a reasonable opportunity shall be afforded for publication by all of their respective members or customers.

(2) That the by-laws of the complainant to which each of its members agrees upon assuming membership provide that news received through complainant's service shall be published exclusively in the newspapers, language and place specified in the certificate of membership; that members shall permit no other use to be made of it whatever; that no member shall furnish or permit any of its employees or anyone connected with its newspaper to furnish any of said news in advance of publication to any other person, or to furnish even to another member any of such news which the complainant itself is debarred from furnishing to such member, or to conduct its business in such a manner that any of such news may be communicated to anyone else not entitled to receive it, or to furnish or permit anyone else to furnish to anyone outside the membership of the complainant any of the news which the respective member is required by the by-laws to supply to

the complainant, which includes the local news of his district.

That the defendant furnishes the news and information collected by it to its customers under an express understanding and agreement with such customers that the same will not be furnished or communicated by them to any other person or persons and that it will remain confidential and secret until it has been regularly published by them in their newspapers.

(3) That the annual cost to the complainant of its news gathering and distribution to its 800 members is very great, being in the year 1915 about \$3,500,000, all of which cost was assessed among the members on a co-operative basis as provided by the By-Laws; and that the annual cost to the defendant of its news gathering and distribution to its 450 customers is very great, amounting to upwards of \$2,000,000.

(4) That defendant has engaged in obtaining and selling to its clients for publication by them complainant's despatches before their publication, and has employed and paid one, B. E. Cushing, the telegraph editor of the *Cleveland News*, a paper holding a certificate of membership from The Associated Press, to furnish it, for sale to its clients and publication by them, not only with the local news of the Cleveland district but also with a substantial amount of other and particularly of Foreign news which had come to the said *Cleveland News* from The Associated Press and over its wire; and that such service by the said B. E. Cushing was in violation of his obligations as an employee of the said *Cleveland News* and of its obligations as a member of The Associated Press.

(5) That defendant has repeatedly taken news furnished by the complainant to its member representing the *New York American* by causing the despatches to be taken on its behalf after being received over the Morkrum receiving machine, before publication thereof.

(6) That defendant has taken and sold to its clients for publication by them, complainant's news, taken either from bulletin boards or early editions of newspapers published by complainant's members, either transcribing them bodily or rewriting them, but in either case without original investigation by its own agencies and without expense; and thereby it has enabled its own subscribers to publish the said news despatches in competition with complainant's members.

(7) That complainant has not authorized any of the aforesaid practices and such instances, if any, as may have occurred have been contrary to its rules.

(8) That the complainant's rules and the practices authorized by its officers have been to use defendant's published despatches only as rumors and to cause them, if important, to be investigated at the points of origin by complainant's own representatives and at its own expense, and then to distribute to its members such reports as its own investigations shall have justified.

(9) That in the particulars aforesaid defendant has acted unfairly in competition with the complainant.

(10) That in the particulars aforesaid, and each of them, the defendant has greatly injured and is injuring the complainant and its members, and has been, and is, depriving them of the just benefits of their labors and expenditures, and has been and is causing them irreparable damage, for which

they are without adequate or substantial relief except by the interposition of this Court by its order of restraint and injunction.

Now, therefore, upon motion of Stetson, Jennings & Russell, Solicitors for complainant, it is

ORDERED, that from and after the filing by the complainant of a proper undertaking to be approved by the Court in the sum of one thousand dollars and from and after the time when the said persons shall severally have knowledge of this restraining order, and until the final hearing and determination hereof or the further order of this Court, the defendant, its officers, agents, servants, employees, assigns, successor and successors, and each of them, and all other persons acting for them, or any or either of them, and all persons aiding or abetting them or any of them, and all persons whosoever, though not named herein, be and hereby are, enjoined and restrained,

(a) From inducing, procuring or permitting any telegraph editors or other employees or agents of the complainant or any of its members or of any newspaper or newspapers owned or represented by them or any of them, or any such members, to communicate to defendant or to permit defendant to take or appropriate, for consideration or otherwise, any news received from or gathered for complainant, and from purchasing, receiving, selling, transmitting, or using any news so obtained.

(b) From inducing or procuring, directly or indirectly, any of complainant's members or any of the newspapers represented by them, to violate any of the agreements fixed by the Charter and By-Laws of the complainant.

(c) From copying, obtaining, taking, selling, transmitting or otherwise gainfully using, or from causing to be copied, obtained, taken, sold, transmitted or otherwise gainfully used *the complainant's news*, either bodily or in substance, from bulletins issued by the complainant *or any of its members*, or from editions of newspapers published by any of complainant's members, until its commercial value as news to the complainant *and all of its members has passed away*.

And the complainant having offered to submit to a like injunction to that contained in subdivision (C) *supra*, it is

ORDERED that the complainant be and hereby is enjoined until the final hearing and determination of this action or the further order of this Court from copying, obtaining, taking, selling, transmitting or otherwise gainfully using, or from causing to be copied, obtained, taken, sold, transmitted or otherwise gainfully used the defendant's news, either bodily or in substance, from bulletins issued by the defendant, or any of its customers, or from editions of newspapers published by any of defendant's customers until its commercial value as news to the defendant and all of its customers has passed away.

And it is further

ORDERED that the complainant have and recover from the defendant the sum of Three Hundred and Two Dollars and twenty cents (\$302.20) costs of said appeal, and have execution therefor.

Dated July 7th, 1917.

(Sgd) AUGUSTUS N. HAND,
U. S. Judge.

Office Supreme Court, U. S.

F. Y. L. D.

APR 17 1918

JAMES D. MAHER,

CLERK.

Supreme Court of the United States.

OCTOBER TERM, 1917.

No. 221

INTERNATIONAL NEWS SERVICE,

Petitioner,

vs.

THE ASSOCIATED PRESS.

SUPPLEMENTAL BRIEF OF DEFENDANT IN OPPOSITION TO THAT PART OF THE ORDER APPEALED FROM WHICH ENJOINS THE DEFENDANT FROM TAKING AND USING THE SUBSTANCE OF COMPLAINANT'S NEWS, PUBLISHED AND SOLD BY NEWSPAPERS REPRESENTED IN ITS MEMBERSHIP, WITH ITS AUTHORITY, OR DISPLAYED BY SUCH MEMBERS UPON THEIR BILLBOARD BOARDS WITH ITS AUTHORITY, UNTIL THE COMMERCIAL VALUE OF SUCH NEWS HAS PASSED AWAY.

WILLIAM A. DEFORD,

Solicitor for Defendant.



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Supreme Court of the United States,

OCTOBER TERM, 1917.

No. 568.

INTERNATIONAL NEWS SERVICE,
PETITIONER,

VS.

THE ASSOCIATED PRESS.

**SUPPLEMENTAL BRIEF OF DEFENDANT IN
OPPOSITION TO THAT PART OF THE ORDER
APPEALED FROM WHICH ENJOINS THE
DEFENDANT FROM TAKING AND USING
THE SUBSTANCE OF COMPLAINANT'S
NEWS, PUBLISHED AND SOLD BY NEWS-
PAPERS REPRESENTED IN ITS MEMBER-
SHIP, WITH ITS AUTHORITY, OR DIS-
PLAYED BY SUCH MEMBERS UPON THEIR
BULLETIN BOARDS WITH ITS AUTHOR-
ITY, UNTIL THE COMMERCIAL VALUE OF
SUCH NEWS HAS PASSED AWAY.**

**The Facts which Relate to the Subject
Matter of this Supplemental Brief.**

The complainant is a corporation created and organized under the laws of the State of New York, and is a citizen and resident of that State.

The defendant is a corporation created and organized under the laws of the State of New Jersey, and is a citizen and resident of that State.

The complainant is a co-operative organization, and was incorporated in the year 1900, under the Membership Corporations Law of the State of New York, and its members have been and are the proprietors and representatives of numerous newspapers, both morning and evening, published throughout the United States.

The more important morning and evening newspapers which are represented in the membership of complainant, are published by corporations which are not, and legally cannot be, "*members*" of the complainant.

The membership in complainant of the person who represents a corporate publisher of a newspaper is, in fact of law, the property of such corporate publisher; but is, from the technical viewpoint of complainant's Charter and By-Laws, the property of such member.

The news service which complainant furnishes to members representing corporate publishers is furnished for the use and benefit of such corporate publishers, and while the contractual obligations running with such service are imposed in theory upon the member, they are in fact imposed upon the corporate publisher.

The representative membership of a corporate publisher in complainant was devised by complainant as a means of overcoming the legal impossibility of such corporate publisher being a member of a membership corporation organized under the laws of the State of New York.

The complainant, since its organization and in accordance with the powers granted by its Certifi-

cate of Incorporation and pursuant to its By-Laws duly enacted, has been and was, at the time of the commencement of this action, engaged in gathering, from sources all over the world, by means of its own instrumentalities, by exchange with its said members, and by other appropriate means, any and all kinds of information, news and intelligence, telegraphic or otherwise, for the use and benefit of its members, and distributing the same among its members for publication in the newspapers owned or *represented* by them under and subject to the provisions of its By-Laws.

The complainant has its representatives in every important capital and city in the world. It has reciprocal arrangements with many important news agencies in foreign countries for the interchange of news. It has about nine hundred and fifty members, each owning or *representing* a daily newspaper in the United States. All the news collected by the complainant is transmitted by wire or telephone, or other appropriate means, to its members for publication in their newspapers.

Complainant's expense in gathering, preparing and transmitting news is very large.

The complainant is not engaged in business for profit, but is (at least in theory) a co-operative organization. The cost of obtaining and transmitting the news which it gathers is divided among the members in accordance with the provisions of the By-Laws.

The complainant has no interest whatsoever in the business, and hence in the profit or loss, of the newspapers which are represented in its membership.

The members of complainant, representing corporate publishers in its membership, are not the owners and hence are not interested in the business

of, or in the profit or loss of, the newspapers which they represent in such membership.

The value of complainant's service to the newspapers represented in its membership, depends upon the promptness, accuracy and impartiality of the news which it furnishes.

The By-Laws of complainant, to which each of its members (the member being distinguished from the corporate publisher whom he represents) agrees upon assuming membership, provide that news received through complainant's service is received exclusively **for the purpose of publication** in the specific newspaper, language and place specified in the **member's** certificate, and that the member shall permit no other use to be made of it whatever; and also that no member shall furnish, or permit anyone in his employ or connected with the newspaper specified in his said certificate, to furnish any of complainant's news, **in advance of publication**, to any person who is not a member, or to furnish even to another member, any news not received from complainant which the complainant itself is debarred from furnishing to such member.

The news which complainant furnishes to the newspapers represented in its membership is furnished to such newspapers, under the contractual obligation of complainant's By-Laws, in so far as such newspapers may be bound thereby, for the purpose of publication and sale by the publisher of such newspaper, as a part of such publication, to any person to whom such publisher may desire to sell the same.

The complainant furnishes and sells to such newspapers, or the corporate publishers thereof, through the instrumentality of their representation in its membership, the news which it gathers and obtains, with the right to the publisher of such

newspaper to sell the same (as stated *supra*) to anyone who may desire to purchase the same, for a cash consideration, fixed by such publisher, without any restriction or limitation as to the use to which such information shall be put by the person or persons who buy it.

The publishers of newspapers represented in complainant's membership cannot, because of the earth's method of rotation, or the time differential that exists between points in the East and those in the West, publish the news which they so receive from complainant simultaneously.

Certain of the publishers of newspapers represented in the membership of complainant publish and sell their newspapers in the City of New York, with allowance for the time differential, approximately three hours before certain publishers of other newspapers represented in its membership can publish and sell theirs.

The defendant was organized in the year 1909, under and pursuant to the laws of the State of New Jersey.

The business of defendant consists in the gathering and selling of news to its customers and clients, which consists of newspapers throughout the United States, under contract by which such newspapers undertake to pay, at stated times, the amounts therein specified for its (defendant's) service.

The defendant has purchased, upon the streets of the City of New York, early editions of newspapers published and sold to it by publishers of newspapers represented in the membership of complainant, which newspapers have contained, from time to time, items of news or information collected and furnished to such publisher by the complainant,

under and pursuant to the contractual obligations of the By-Laws of complainant, as hereinbefore set forth.

The defendant, after buying the items of news or information contained in the newspapers so purchased, has, from time to time, rewritten therefrom a narrative of the essential facts of the items of news contained therein, furnished by complainant to such newspaper, and has transmitted such rewritten narrative, or story, to its clients and customers, for a stated consideration, under and pursuant to its contract obligations to them.

There is nothing in the record here to show that complainant rewrote, transmitted and sold the information and news so obtained, without the prior verification thereof by it.

The complainant admits that it has, from time to time, obtained tips of the essential facts of items of information or news obtained by the defendant, rewritten the same and distributed the same to its members, under the contract obligations set forth above; but it denies, in so far as the record here is concerned, that it ever made use of such items of information or news without first verifying the same.

The defendant will be able to conclusively establish at the trial, if the fact be disputed upon the argument before this Court as one not disclosed by the record here, that complainant has habitually and systematically rewritten the essential facts of information or news furnished by defendant to its clients and customers, after publication of the same in one of the first published newspapers of defendant's clients and customers, with and without verification.

The right of one news association or agency to

rewrite essential facts of news stories contained in any newspaper sold or published throughout the United States, and to sell the same to its customers, has been generally recognized and acquiesced in by the complainant and all of the other news agencies or associations operating in the United States, since the foundation of the Government of the United States and the existence of said agencies or associations.

Contentions of the Parties.

The contentions of the parties, (on the point to which this brief is directed), are, as the writer understands them, as follows:

The complainant contends:

(a) That "The machinery set up by it to gather, to sift, to transmit, and to distribute news—the venture, the skill, the labor, the expenditure that, altogether, make the service—is a service that draws to it the right of property; and that this right of property is trespassed upon and destroyed or depreciated by the appellee seizing as its own the thing served—**its quality of firstness**—and thereby destroying the only value such service possesses";

(b) That the publication by complainant's members of the news so gathered, sifted, transmitted and distributed by complainant to them with authority to publish and sell, was not such a "publication", "within the meaning of the decisions revolving around the (copyright) statutes", as would constitute a dedication to the public; because the word "publication", as used in such decisions, related to the **statutory** and not the **original** right;

(c) That there was originally, at common law, a right of property in news, which common law right was replaced (as the result of the enactment of the copyright statutes), by the restricted statutory right;

(d) That the original common law right of property in news, "was a right in perpetuity and could not be lost by anything short of express dedication to the public or abandonment";

(e) That the word "publication", as used in the decisions revolving around the copyright statutes, was intended to apply to the statutory right, and to defeat that right, and was intended to signify only the kind of publication that would defeat that right "where the statutory conditions had not been complied with";

(f) That the complainant's common law property right in news in perpetuity, was not defeated by "publication", because the only "publication" that could defeat that right would be one made under such circumstances as to constitute an **express** dedication to the public, or an **express** abandonment of that right;

(g) That the complainant had "published" the news under such circumstances as to constitute an abandonment to the public of its statutory right but not of its common law right, a right existing in perpetuity, unless expressly abandoned; and that this Court should recognize that it had that right, and protect it until complainant's last publishing member (protected against the time differential) shall have had a reasonable opportunity to realize the full commercial value of the news first gathered, and (as to certain of complainant's members) first distributed and published by complainant; and

(h) That it is fundamentally wrong that defendant should be permitted to rewrite and sell, (without the expense of gathering, sifting or transmitting it from the point of ascertainment), facts of news which complainant had gathered, sifted, and so forth, at its own expense, and which it had delivered to its members for sale without restriction as to its use;

(i) The defendant, in rewriting and selling to its clients information or items of news, contained in newspapers represented in complainant's membership and published and sold to it by complainant's authority, without restriction as to its use, is guilty of unfair competition with complainant, though it has not sold that information as complainant's news, (as news having the value of complainant's skill or liability in collection, preparation or distribution), but sells it as its own, or as if it had been obtained, prepared and distributed by it.

The defendant's answering contentions are:

(a) News of events of spontaneous origin is, and has always been held to be, **public property**;

(b) News of events of spontaneous origin, the essential facts of such news, are, and have always been held to be, **public property**;

(c) That if an author had a perpetual right at common law (prior to the enactment of the copyright statutes) to the products of his own research and literary genius, which was replaced and narrowed by the copyright statutes, *that the writer of a narrative of news events of spontaneous origin had no such right to the essential facts of news embodied in his narrative, whatever its distinctive literary quality*;

(d) That news of facts of spontaneous origin is not, and has never been held to be, the subject of copyright, and is not protected by, and has never been held to be within the protection of, the copyright statutes;

(e) That the word "publication", as used in the decisions revolving around the copyright statutes, has no reference, limited or otherwise, to private property in facts of news of spontaneous origin, because they were public (not private) property at the common law, and the copyright statutes did not relate to them, but only to an author's common law property right in the distinctive product of his research and literary genius;

(f) That complainant never had any property in the facts of news of spontaneous origin, which it could either dedicate or abandon to the public;

(g) Complainant, if it ever had a property right in the facts of news of spontaneous origin, lost that right, by analogy of reasoning in the cases revolving around the copyright statutes, by their **authorized** publication and sale without restriction, or their dedication or abandonment to the public, both as a matter of law and of fact;

(h) That complainant has a property right in, or in the commercial value of, an organization, instrumentality or service, devised and used to obtain, confidentially handle and distribute, news of events of spontaneous origin;

(i) That a Court of Equity will protect complainant's organization or instrumentality, for the confidential gathering and distribution of facts of news, from the corrupt or surreptitious taking of it, as long as it is in the confidential possession of com-

plainant's organization or instrumentality, and **no longer**, or to the point of authorized publication, and **no further**;

(j) That complainant lost its right to a Court of Equity's protection of the news in the confidential possession of its organization or instrumentality, when that news was published and sold by its authority, or when that news, as the result of its own act, **ceased to be confidential**;

(k) There is no case in equity which has recognized the proprietary interest in news as distinguished from the instrumentality by which it is gathered or distributed after publication, and the cases cited by complainant in support of its contention that such proprietary interest has been recognized, are inapplicable and do not support the proposition;

(l) Equity will protect the **instrumentality** in its confidential handling and distribution of news only to the point of its publication and sale; this protection has the effect of maintaining the confidential quality and value of the news without recognizing a property right in it as such;

(m) There is no case that holds that the voluntary publication of news of events of spontaneous origin in a single newspaper, sold and authorized to be sold, without restriction as to the use of the contents of such newspaper, does **not** constitute an abandonment to the public of the news so published;

(n) The complainant here has, **as matter of fact**, authorized its members, under its agreement with them as evidenced by its rules and course of conduct, to publish and sell in their newspapers

the news furnished them by complainant as soon as it is received, and with no other restriction than that they shall not furnish such news to others prior to its publication and sale by them individually; and such publication and sale constitute an abandonment to the public;

(o) The complainant authorizes its members to publish and sell upon receipt the news which it furnishes them, and to sell that news upon the street without restriction (if any could be lawfully imposed) upon its use by the person that buys it; so that when defendant buys the news furnished by complainant, in a newspaper published and sold by one of complainant's members, it (defendant) can do as it pleases with it. (There is no privity of contract between complainant and the defendant as the buyer of the newspaper of one of complainant's members.)

(p) The gist of complainant's prayer for relief is that this Court, by its decree, cure a defect (based upon the differential in the time of the publication of its members' newspapers) in its instrumentality for the gathering, distribution, publication and sale of news, and create in it, or in its members, **after publication**, a property right in news of events of spontaneous origin;

(q) It is not fundamentally wrong for defendant to rewrite and use facts of news whenever and wherever it obtains information of them, which are public property and have never been held to be private property; especially when defendant has bought that news or information from a publication authorized by complainant to print, publish and sell it to defendant, or any other person, without restriction as to its use;

(*r*) The complainant is not asking protection for itself against financial loss, for it is not engaged in business for profit (it insists and its by-laws show that it is a mutual benefit organization); that the injury, if any, is done by stripping corporations, publishers of newspapers represented in complainant's membership, of the right of first publication of news obtained and furnished to them by The Associated Press, of which they have been deprived by the concurrent force of the publication of that news in the East and the obstacle of the time differential.

(*s*) The defendant has not been guilty of *unfair competition* with the complainant in the re-writing and selling of items of information and news contained in newspapers represented in complainant's membership and published and sold with its authority, without restriction as to its use; because defendant purchased the news from a seller thereof licensed by complainant to publish and sell the same; and because defendant, in re-writing, selling and distributing such news, has not represented it to be the news of complainant, or to have whatever inherent value it might be thought to have if it were represented as news which had been gathered, prepared and distributed by complainant.

Analyses of the Opinion of the Circuit Court and of the Dissenting Opinion of Judge Ward.

The contentions of the parties, as set forth above, are passed upon, specifically or generally, in the opinions of the majority and minority of the judges of the Circuit Court; the opinion of the majority of

the judges, written by Judge Hough, runs with greater force and to a greater extreme of reasoning favorable to the complainant, than complainant's contentions; the opinion of the minority of the judges, written by Judge Ward, constitutes a bare, concise statement of certain of the general contentions of the defendant.

The writer, that this Court may follow the conflicting propositions of the parties from their briefs through the opinions of the judges upon them, here sets forth the principles, the decisive propositions, contained in the conflicting opinions of the judges themselves.

Opinion of the Circuit Court, by Hough, J.

The opinion of the Court (written by Judge Hough, with Judge Rogers concurring) is a product of semi-philosophic generations, **based** (as the writer respectfully submits) **upon half truths**, and is as follows:

(1) Whether there is or can be any property in facts *per se*, any more than there is in ideas or mental concepts, is a metaphysical query that can be laid aside, for there is no doubt either on reason or authority that there is a property right in news capable of and entitled to legal protection.

Property, *nomen generalissimum* covers everything that has an exchangeable value (The Slaughter House Cases, 16 Wall. at 127); that news possesses the quality stated, seems obvious enough when it is observed that defendant takes it, in order to exchange it against dollars.

(P. 197.)

(2) There is no distinction entailing a legal difference, between news of the prices of corporate securities or commodities, of sporting events, or opportunities of profitable contracting, and news of current political, social or national events. Both require labor and expense in acquisition and transmission and dissemination, both have exchangeable values, and all alike lose by exposure the quality of news, which when it becomes history may remain important, but its commercial quality has largely gone.

(P. 197.)

(3) If it be admitted that plaintiff's right of property in its news once existed, such existence was for the benefit of all its members, who, however (owing to the earth's method of rotation), cannot simultaneously exercise their several rights. Yet all exercise them at the same hour of their several days.

(Pp. 197-198.)

(4) It is sought, if not to limit the doctrine of property in news, to the time during which it remains locked up in the breast of its gatherer; to interpret the decisions cited, as meaning only that news is "like a trade secret" (198 U. S. 250), lost when divulged in the course of business.

(P. 198.)

(5) News is far more than a trade secret, for that must remain private to have its best value, while news is obtained for publicity alone. The true line of decision is indicated by the conclusion of the court in the Christie case,—that the "information will not become public property until the plaintiff has gained his reward" (198 U. S., at 251). Of course, this means his reasonable reward, and as in

that instance of trade quotations; divulging the same to one patron's office full of customers, did not reasonably terminate plaintiff's property; so here it is reasonable and just that each member of plaintiff, and plaintiff itself has a property right in its news until the reasonable reward of each member is received, and that means (with due allowance for the earth's rotation) until plaintiff's most Western member has enjoyed his reward; which is, not to have his local competitor supplied in time for competition with what he has paid for. Surely this is a modest limit of rights.

(P. 198.)

(6) It still remains true that plaintiff's property in news is not literary at all, that it is not capable of copyright, and that "publication" as that word is used in the long line of decisions regarding literary rights, has no determinative bearing on this case. No one before ever attributed to publication a sense that would limit a lawful business to a few degrees of longitude. The word is legally very old, and of no one certain meaning. Publication of evidence in equity or admiralty, of banns, of libel, etc., bear but remote relation to the act which is thought once to have terminated an author's property, and now is a requisite to statutory copyright. The thought however running through all the uses of the word, is an advising of the public, a making known of something to them for a purpose. It follows that the crucial enquiry is as to that purpose, is it lawful?

(Pp. 198-199.)

(7) In all the "quotation" cases, it was held that the purpose of the publicity given, was not to let other people sell the quotations, and that that

purpose was lawful, as we put it in the Tucker case (221 F. R. 307) "the posting of quotations . . . on a blackboard . . . is not the sort of publication which will terminate complainant's property right in them".

(P. 199.)

(8) We have assumed the newspaper first printing to be copyrighted, and no doubt its publication of its early edition was a general publication; but it could not copyright, abandon nor destroy what it did not own; and it did not own plaintiff's property, in the news, nor that of its own fellow members in California. It did own the right to print in New York, but we discover no magic in the word "publication" which takes away or terminates the rights of others.

(P. 199.)

(9) Plaintiff's purpose in furnishing the (*c. g.*) New York paper with news, was to have a use made of it, not inconsistent with its own reasonable reward for its labor from its property, and that of all the other members of plaintiff. That measure of use and reward is lawful; defendant deprives plaintiff thereof, and can show no equities; therefore defendant should be enjoined.

(P. 199.)

(10) Unfair competition like all oft uttered legal phrases has acquired rather a narrow use. In *McLean vs. Fleming*, 96 U. S., at 251, a decision which is near the foundation of American case law on this subject, it was said that what equity enjoins the wrong-doer from depriving another of is "the advantage of celebrity". This thought has led to the feeling that what a plaintiff must be

robbed of is the good-will and business ease resulting from his well known name, or the attractive dressing, wrapping or form of his product; that such robbery must be by imitation; and that the test of such imitation is the effect upon the public or that part thereof likely to require wares such as those in controversy.

(Pp. 199-200.)

(11) But laying aside the right of property as the ultimate foundation of suit, the business method of selling in competition with plaintiff and its members, something falsely represented as gathered by defendant otherwise than from bulletins and early editions is unfair, because it is parasitic and untrue. It is immoral, and that is usually unfair to some one.

(P. 200.)

(12) The order appealed from is modified, as indicated, and the cause remanded with directions to issue injunction against any bodily taking of the words or substance of plaintiff's news, until its commercial value as news has in the opinion of the District Court passed away.

(P. 201.)

Opinion of Ward, J., Dissenting.

The opinion of Judge Ward, running with certain of the basic propositions presented by defendant to the Circuit Court, is as follows:

(1) A distributor of news, that is, of his information about things that have happened, neither invents nor composes nor manufactures anything, nor does he supply something which the public

buys because it believes it originates with him and wants his article.

(P. 201.)

(2) *A distributor of news does not own the news, but only his knowledge of the news.* Therefore analogies from property created or protected by the patent, copyright or trade-mark statutes or by the principles regulating unfair competition are wholly inapplicable.

(P. 201.)

(3) *The distributor's knowledge of news which he has gathered is his property so long as he keeps it to himself or communicates it only to others on condition that they will do so.* He will be protected against any one who surreptitiously obtains this information from one of his members, subscribers or employees or by any form of pilfering or unfair means.

(P. 201.)

(4) In every one of these cases the Court found that the defendant, got the news or the quotations surreptitiously and enjoined him for that reason.

(P. 202.)

(5) *But if the distributor publishes, to use a word in this connection which I think has been unreasonably criticized, or abandons or dedicates or communicates his information to the world, his right of property in his information and his right to be protected against the use of it is gone.*

(P. 202.)

(6) The Supreme Court in the Christie case, *supra*, page 250, likened property in news to prop-

erty in trade secrets. The two are strikingly similar. The owner of a trade secret will be given protection against any breach of confidence in respect to it by his employes and against any dishonest discovery of it by third parties. If, however, he communicated the secret to another without condition or if any one by his own efforts, for instance by analysis of a secret compound, learns how it is made, such persons may use it without any accountability to the original discoverer. *That the discoverer spent much time and money in discovering the secret would not be regarded as a reason why such persons learning it honestly should not make use of it.*

(P. 202.)

(7) In this case the complainant furnishes news to its members for the express purpose of their putting it on their bulletin boards and issuing it to the public in their newspapers. This is what they live on. *After this it seems to me pure fiction to say that any property in the distributor survives.* Everything in the nature of a confidence about the communication has ceased. *That the rotation of the earth is slower than the electric current is a physical fact the complainant must reckon with in doing its business.* That news dedicated to the public with the complainant's consent by the morning newspapers in New York can be telegraphed in time to appear in the morning newspapers of San Francisco cannot qualify the legal effect of the dedication. *There being not the least evidence of anything fraudulent or underhanded in this method of obtaining news,* I think the injunction should be denied.

(P. 202.)

ARGUMENT.

I.

The complainant has a right of property in the organization and machinery it has created and is maintaining for the confidential gathering and distribution of facts of news.

II.

News of events of spontaneous origin is, and has always been held to be, public property, and complainant has no property right in such news.

Judge Hough, in the case of *Davies vs. Bowes* (209 Fed. Rep. 54), at page 56, has clearly stated the law in this regard in the following language:

“there can be no piracy of the facts, because facts are public property.”

In *Nat'l Telegraph News Co. v. Western Union Telegraph Co.* (119 Fed. 294), at pages 299-300, the Court says:

“It would be both inequitable and impracticable to give copyright to every printed article. Much of current publication, in fact, the greater portion, is nothing beyond the mere notation of events transpiring, which, if transpiring at all, are accessible to all. It is inconceivable that the copyright grant of the constitution and the statutes in pursuance thereof were meant to give a monopoly of narrative to him who, putting the bare recital of events in print, went through the routine formula of the copyright statutes.

It would be difficult to define comprehensively what character of writing is copyrightable and what is not, but . . . we may fix the confines at the point where authorship proper ends and mere annals begin. Generally speaking, authorship implies that there has been put into the production something meritorious from the author's own mind . . . A mere annal, on the contrary, is the reduction to copy of an event that others in a like situation would have observed. . . . The printed matter on the tape in question (the Court referred to a ticker tape on which were carried stock quotations and news of interest of the day) is in no sense copyrightable. . . . It is in its totality nothing more nor less than the transmission by electricity over long distances of what a spectator of the event occupying a fortunate position to see or hear would have communicated, by word of mouth, to his less fortunate neighbor. It is an exchange merely over wider area of the ordinary sight seeing, and the exchange is in the language of the ordinary sightseer. **A matter of this character is not, within the meaning of the copyright law, the fruit of intellectual labor, and would not, if actually copyrighted, be protected by the Courts."**

In *Tribune Co. v. Illinois Pub. & Print Co.*, 76 Pub. Weekly, 643, 947, the question was presented as to whether Peary's account of his discovery of the North Pole could be copyrighted, and in this case, Judge Grosscup used the following language:

"A scientist makes a discovery in natural law. He puts that in the form of a book. He copyrights that book. The law protects him in that copyright, but having stated a fact as, for instance, the discovery of the telephone, the world may take up and state and discuss that fact as the world may take up and state and

discuss this Peary pamphlet or book when it appears **It is the composition in which that fact is embodied that is protected. It is not the fact. The facts are public property.** There is no question about that. **The moment he published it, it is public property;** but the way in which he does it, that is private property."

In *Bowker on Copyright*, the author says, at pages 88 and 89:

"In respect to news, there is no provision in the new code. A bill to protect news for twenty-four hours was at one time before Congress, but was never passed. There is, therefore, no copyright protection for news as such, but the general copyright of the newspaper or a special copyright may protect the form of a dispatch, letter or article containing news. Thus, the *New York Herald* copyrighted without question Dr. Cook's Arctic dispatches, and the question as to the copyright by the *New York Times* of Commander Peary's dispatches describing his dash for the Pole hinged solely on the question of ownership or authority to copyright, as set forth in a later chapter. But any such copyright could not prevent publication by other newspapers of the news that Cook and Peary claimed to have reached the North Pole, at stated dates and under stated circumstances, though their own form of statement of the facts could not lawfully be copied except within 'fair use'."

To the same effect,

Springfield v. Thame, 89 L. T. 242;

Clayton v. Stone, 2 Paine, 382;

Baker v. Selden, 101 U. S. 99;

N. Y. Times Co. v. Sun P. & P. Assoc., 195 Fed. 110; 204 Fed. 586;

Walter v. Steinkopff, L. R. 3 Ch. Ed. 489.

Complainant's attitude in this case seems to be that it is not only not willing that defendant shall do as complainant does, but that the rules of law which it has been instrumental in having clearly enunciated shall not be available to defendant.

It seems to us that the decision in the case of *Tribune Co. of Chicago vs. Associated Press* (116 Fed. Rep. 126) is controlling in the case at bar. In that case the Chicago Tribune, by agreement with the London Times, had secured for use in the Tribune's columns the Boer war news especially gathered by the Times. The Associated Press, through its London agents, purchased early editions of the Times, selected items of news therefrom and cabled same to the Associated Press, which in turn was distributed by it to its members. (Here we may pause to emphasize the fact that we have a judicial determination of the fact that complainant is engaged in what it improperly characterizes as the "current misappropriation of" news.)

The Chicago Tribune sought to enjoin the Associated Press from pursuing this practice.

Judge Seaman in denying the injunction, at page 127, says:

"Literary property is protected at common law to the extent only of possession and use of the manuscript and its first publication by the owner With voluntary publication the exclusive right is determined at common law. . . ."

To the same effect see

Press Pub. Co. vs. Monroe, 73 Fed. Rep. 196;

Ladd vs. Ornard, 75 Fed. Rep. 703, 731;

Jeweler's Mer. Agency vs. Jeweler's Pub. Co., 155 N. Y. 241;

Board of Trade v. Hadden Knoll Co., 109
Fed. Rep. 705;

Board of Trade v. Thompson, 103 Fed.
Rep. 902.

This principle was expressly recognized by Judge Kohlsaas, in *Cleveland Tel. Co. vs. Stone et al.* (105 Fed. Rep. 794).

In the *Stone* case, *supra*, the defendants were charged with having obtained certain quotations compiled by the Chicago Board of Trade and supplied by it to its customers or members before the same were made public. Judge Kohlsaas expressly recognized a property right in such quotations so long as, and only so long as, "the same are not made over to the public".

The complainant contended at Circuit that its right of property in the machinery set up by it, to gather, to sift, to transmit and distribute news, "was trespassed upon and destroyed by the appellant's seizing as its own the thing served—its quality of firstness—and thereby destroying the only value such service possesses".

The fallacies of that proposition are:

The complainant can have no property in news of events of spontaneous origin.

The quality of "firstness" to which complainant refers, is not a quality of the news which it obtains, but it is a merit of its machinery for obtaining it.

That quality of "firstness" has a commercial value to the service which complainant's machinery was set up to render.

Plaintiff is entitled to the protection of that quality or value as long as it retains that news in its **confidential** possession, as long as that quality or value is not destroyed by its own act, as long as

that quality or value is not liberated, commercialized, published and sold by it or by its authority.

(The liberation, commercialization, publication and sale of that news is as complete and perfect, as a matter of principle, when it is published and sold to those who purchase the newspaper of one of complainant's "members" as it would be if it were sold to all of the purchasers of all of the newspapers of all of complainant's "members". The true test is the fact of its liberation, commercialization, publication and sale, the fact of the destruction of that quality by its act or consent, and not the extent thereof.)

Equity will protect complainant from being deprived of that quality or value while complainant preserves it as a trade secret, in the confidential possession of complainant's collecting and distributing machinery, and from its being corruptly or surreptitiously taken from complainant while so possessed, or as long as that quality or value is preserved.

Complainant cannot (by its liberation, commercialization, authorized publication and sale of that news to a corporation represented in its membership) liberate, commercialize, sell, or destroy that quality and then ask Equity to exercise its power to protect something that no longer belongs to complainant, that has been destroyed by its act or authority, that no longer exists.

Equity will not cure a defect in complainant's machinery for gathering and distributing news (which it can correct by the sacrifice or inconvenience, by the delayed publication of its Western "members") in order to enable it to make (as the result of Equity's exercise of its power) a simultaneous publication which the time differential pre-

cludes it from making; Equity will not cure a defect which complainant can cure and will not cure at the necessary sacrifice or delay, and assume the power or burden of removing the natural obstacle of the time differential out of the way of complainant's, or its "members'", commercial enterprise.

Judge Hough empirically brushes aside the argument that complainant can have no property in news, or in a merit of its service that it has liberated, commercialized and sold, saying:

"Whether there is or can be any property in facts *per se*, any more than there is in ideas or mental concepts, is a metaphysical query that can be laid aside, for there is no doubt either on reason or authority that there is a property right in news capable of and entitled to legal protection.

Property, nomen generalissimum covers everything that has an exchangeable value; that news possesses the quality stated, seems obvious enough when it is observed that defendant takes it, in order to exchange it against dollars."

The rule declared by the Courts (in all the applicable cases) **that facts are public property**, the principle enunciated by Judge Hough that "There can be no piracy of public facts, because facts are public property", has always been thought to be a vital established rule. The learned Judge brushes it lightly aside as a metaphysical entity, and proceeds to vitalize a property right (to protect with a new principle or rule) another metaphysical "entity", the quality of "firstness".

It would seem to follow that if there was no such thing as **private** property in news, there would be no such thing as private property in a quality predicated upon the time when plaintiff obtained it, *or*

private property in the "firstness" of plaintiff's getting public property. The learned Judge goes further; he preserves that private property in a metaphysical "entity" in complainant, **even after complainant has authorized its commercialization, its sale, for a cash consideration.**

The learned Judge further says:

"That news possesses the quality stated seems obvious enough, when it is observed that defendant takes it in order to exchange it against dollars."

The defendant, by the assertion of complainant, takes both the facts of news and the quality of "firstness"; does it not get dollars from both? Are not both, therefore, private property, by the Judge's logic?

Does not complainant continue to serve the news, even though stripped of its quality of "firstness" by this defendant, and does it not get dollars from it? Is it not, therefore, by the Judge's token, private property?

The truth is that the argument upon which the complainant bases its claim of a property right in news, or the quality of firstness, rests, not upon equity, nor upon logic, nor upon long established public policy, but upon the meticulous metaphysics of Judge Grosseup, sustained by the greater power of Judge Hough's empirical philosophy.

III.

The author of a narrative of news events had no property right, at the English common law (prior to the enactment of the Copyright Statutes) in the facts of news set forth in such narrative, such as the author of a book or literary composition had; but, even if he did, the restrictive rights conferred by the Copyright Statutes replace those existing at the common law, and the writer of a narrative of news events could only have that property therein which the Copyright Statutes confer.

It is the common law (the common law of the United States as distinguished from the English common law) that an author of any book or literary composition had the sole right of first printing and publishing the same for sale; and might bring an action against any person who printed, published and sold the same without his consent; and the author was not deprived of his right of property in that book or literary composition by his printing and publishing it.

The author of such book or literary composition, and his assigns, had the sole right of printing and publishing the same in perpetuity at the English common law; and this right was "impeached, restrained and taken away by the Statute of Eighth Anne".

The author of any such book or composition was precluded from any remedy for its protection, except on the foundation, and subject to the terms and conditions, of the Statute of Eighth Anne.

(*Bowker on Copyright*, Edition 1912, pages 25, 26.)

The writer has been unable to find a single common law authority to the effect that a writer of a narrative of events of current news had any property rights whatsoever in the facts of news narrated by him, and asserts, therefore, that there is no such authority.

All of the literary matter that was the subject of private ownership at the English common law, or at common law as it is defined in the United States, is the subject of restricted ownership under the replacing Copyright Statutes.

Neither the principles of science nor the facts of current news embodied in a narrative, are of that class.

The news obtained by complainant (whatever its quality of firstness in procurement or partial or complete distribution) is not, and news of that class has never been, private property.

IV.

News of events of spontaneous origin are public property, and as such are not even the subject of copyright.

National Telegraph News Co. v. Western Union, 119 Fed. 294;
Tribune Co. v. Illinois Publishing & Printing Co., 76 Pub. Weekly, 643, 647;
Bowker on Copyright, pp. 88, 89;
Springfield v. Thame, 89 L. T. 242;
Clayton v. Stone, 2 Paine, 382;
Baker v. Selden, 101 U. S. 99;

N. Y. Times Co. v. Sun P. & P. Ass'n,
195 Fed. 110; 204 Fed. 586;
Walker v. Steinkopff, L. R. 3 Ch. Ed. 489;
*Tribune Co. of Chicago v. Associated
Press*, 116 Fed. 126.

V.

Equity recognizes a property right in, or in the commercial value of, an organization, instrumentality or service, devised and used to obtain and confidentially handle and distribute news of events of spontaneous origin, and will use its powers to protect such service, in its handling and distribution of such matter, as long as it remains confidential and no longer, or to the point of publication and no further.

The foregoing proposition is sustained by the following authorities:

Board of Trade v. Christie Co., 198 U. S. 236, p. 251:

"In the first place, apart from special objections, the plaintiff's collection of quotations is entitled to the protection of the law. It stands like a trade secret. The plaintiff has the right to keep the work which it has done, or paid for doing to itself. The fact that others might do similar work, if they might, does not authorize them to steal the plaintiff's. Compare *Bleistein vs. Donaldson Lithographing Co.*, 188 U. S. 239, 249, 250."

National Telegraph News Co. vs. Western Union Tel. Co., 119 Fed. 294:

"Now in virtue of this quality, and of this quality alone, the printed tape has acquired a

commercial value. It is, when thus looked at, a distinct commercial product, as much so as any other output relating to business, and brought about by the joint agency of capital and business ability. **In no accurate view can appellee be said to be a publisher or author. Its place, in the classification of the law, is that of a carrier of news;** the contents of the tape being an implement only, in the hands of such carrier, in its engagement for quick transmission. This is Service, not Authorship, **nor the work of the Publisher.**

The business involves, also, the use of property. This consideration brings it at once, in a general way, within the protecting care of courts of equity."

F. W. Dodge Co. vs. Construction Information Co.,
183 Mass. 62:

"What the plaintiff has when the defendant seeks to obtain it from him is the possession of valuable information. This early possession is valuable in itself. The plaintiff has it and the defendant does not have it. **If the defendant can obtain it legitimately he becomes the owner of the same kind of property, and the two may become competitors in the market as vendors to those who are willing to pay for it.** But if the defendant surreptitiously and against the plaintiff's will, takes from the plaintiff and appropriates the form of expression which is the symbol of the plaintiff's possession, and thus, by direct attack, as it were, divides the plaintiff's possession and shares it, this conduct is a violation of the plaintiff's right of property. That there is a right of property of this kind has been decided in England in regard to information of stock quotations and other different kind of news obtained to be furnished to those who will pay for

it. . . . This has also been held by different courts in this country. . . . We are of opinion that one's possession of information which he has obtained, compiled, and put in form for a specific use, is a right which ought to be protected against those who would share it with him **without his consent.**"

Kiernan vs. Manhattan Quotation Telegraph Co.,
50 How. Pr. 194, 196, 198:

"This right of property, however, does not preclude another person, as the result of his own efforts and diligence, from collecting independently, and utilizing as he may see fit, the same materials.

"Applying this principle to the case of the Associated Press, it is clear that it has a right of property in all news transmitted to it by its agents, until it abandons that right by publication. The agents of the Associated Press abroad, it is true, only do that which any other person could do if they felt so disposed; but the collection of news being the result of their own labor, and its value as news being impressed upon it by the fact of such collection, and by the fact of its being telegraphed by cable at great expense, clearly bring such dispatches within the principles of the cases cited.

To say that the Associated Press could not restrain the publication of its dispatches by any person who should surreptitiously obtain them would be to hold that no private individual could prevent the publication of his own private dispatches if they should happen to relate to public events.

It seems to me clear, therefore, that there is a right of property which will be protected by the court, in the news collected by the Associated Press abroad and telegraphed

to it by its agents, so long as that right is not abandoned by publication; and as Mr. Kiernan has succeeded to the rights of the Associated Press as far as relates to 'foreign financial news', he is entitled to protection in the use of that news, unless he abandons it by publication."

Exchange Telegraph Co. v. Howard, 22 Law Times Rep. 375:

"Mr. Justice Buckley delivered judgment to-day as follows: The plaintiffs carry on the business of collecting and distributing information. **The knowledge of a fact which is unknown to many people may be the property of a person that others will pay the person who knows it for information as to that fact. In unpublished matter there is at common law a right of property,** or there may be in the circumstances of the case. The plaintiffs here sue, not in copyright at all, but in respect of that common law right of property in information which they had collected and which they were in a position to sell. **Their case is that the defendant has stolen their property, that he has surreptitiously obtained that which belonged to them, and used it in rivalry with them.** The plaintiff's business consists in, among other things, a collection of sporting intelligence."

Tribune Co. vs. Illinois Publishing & Printing Co., 76 Pub. Weekly, 643-647:

"It is the composition in which that fact is embodied that is protected. It is not the fact. **The facts are public property. There is no question about that. The moment he publishes it, it is public property, but the way he does it, that is private property.**"

Tribune Co. of Chicago vs. Associated Press, 116 Fed. Rep. 126:

"Literary property is protected at common law to the extent only of possession and use of the manuscript and its first publication by the owner. . . . **With voluntary publication the exclusive right is determined at common law.**"

Cleveland Telegraph Co. vs. Stone et al., 105 Fed. 794:

The Court, in this case, recognized a property right in quotations of the prices of grains and stocks so long as, and only so long as,

"the same were not made over to the public".

The foregoing cases sustain the principle clearly and accurately stated by Ward, *J.*, as follows:

"A distributor of news does not own the news, but only his knowledge of the news. . . . The distributor's knowledge of news which he has gathered is his property so long as he keeps it to himself or communicates it to others only on condition that they will do so. He will be protected against anyone who surreptitiously obtains this information from one of his members, subscribers or employees, or by any form of pilfering or unfair means."

Judge Hough challenges the foregoing proposition, saying:

"It is sought, if not to limit the doctrine of property in news, to the time during which it remains locked up in the breast of its gatherer; to interpret the decisions cited, as meaning only that news is 'like a trade secret' (198 U. S. 250), lost when divulged in the course of business.

News is far more than a trade secret, for that must remain private to have its best value, while news is obtained for publicity alone. The true line of decision is indicated by the conclusion of the court in the Christie case,—that the ‘information will not become public property until the plaintiff has gained his reward’ (198 U. S. at 251). Of course, this means his reasonable reward, and as in that instance of trade quotations; divulging the same to one patron’s office full of customers, did not reasonably terminate plaintiff’s property; so here it is reasonable and just that each member of plaintiff, and plaintiff itself has a property right in its news until the reasonable reward of each member is received, and that means (with due allowance for the earth’s rotation), until plaintiff’s most Western member has enjoyed his reward; which is, not to have his local competitor supplied in time for competition with what he has paid for. Surely this is a modest limit of rights.”

Judge Hough’s statement that news is “a trade secret” is inaccurate.

The “news” is not a trade secret. The complainant’s **knowledge** of the news, obtained and **confidentially retained** by its “machinery” or agents, is a “trade secret”.

Equity will protect complainant’s “confidential knowledge” of news until the seal of confidence is broken by complainant’s voluntary disclosure of it.

Complainant here not only authorized all of its “members” to disclose its news, but delivered it to them for publication and sale, to whomsoever would buy it, without any other restriction upon the publishing and selling member than that he would not furnish it to others prior to its publication and

sale in the newspaper which he owned or represented in complainant's membership.

Judge Hough's statement "The true line of decision is indicated by the conclusion of the Court in the Christie case—that the 'information will not become public property until the plaintiff has gained his reward' ", is both inaccurate and disingenuous.

The foregoing statement, apparently justified by the detached excerpt from the opinion in the Christie case, is that publication depends upon reward; that there can be no publication until there is reward; and that news which is published or sold on the streets is not **published** until the publisher has been actually paid for it, or until he has received his reward.

The Christie case referred to is so clearly distinguishable from this case in fact and principle, as to make Judge Hough's use of that excerpt from the opinion in that case, a mis-use of it.

The distinction of fact, and hence of principle, between this case and the Christie case (a distinction which destroys the apparent force of the excerpt quoted by Judge Hough), is set forth in the next succeeding subdivision of the Argument here.

VI.

There is no case in equity which has recognized the proprietary interest in news after publication, as distinguished from the instrumentality by which it is gathered and distributed; and the cases cited by complainant in support of its contention that such proprietary interest has been recognized, are inapplicable and do not support the proposition.

The Board of Trade vs. The Christie Company, 198 U. S. 236, p. 251 :

The Board of Trade (the complainant) gathered news and facts of prices of stocks and commodities which it communicated to the defendant, in confidential relation with itself, "under a contract not to make it public". The Court there held that the news and facts so gathered were "like a trade secret", and that the complainant was entitled to a decree enjoining the defendant, to whom the news and facts were communicated by it, from violating its contractual obligation not to "make the same public", so that the gatherer might be permitted to gain its reward.

The difference between the Christie case and the case at bar are :

(a) The members of complainant are under obligation not to furnish to others any of the news supplied by complainant, in advance of the publication by them (that is, in advance of publication by such member in his particular newspaper) ;

In the Christie case, defendant received the news for his own information or use.

In the case at bar, complainant supplied the news to each of its own members, not only for that mem-

her's particular use, but for publication by him wherever it might go; not for his particular use, but that he might sell it, **without restriction**, to the multitude of purchasers, to as many as would buy it.

In the Christie case, information was furnished to the Christie Company, under its agreement not to make the same public.

In this case, complainant furnished the information to its members for publication and sale under an agreement that they would not furnish it to others in advance of its publication by them in their newspapers, that is to say, under an agreement that no member would furnish complainant's news to others until it had appeared in his own newspaper.

(Note: It is clear, therefore, that complainant, by its own rules which constitute its agreement with its members, sought to impose no restriction upon its members' use of the news furnished to it by complainant after the publication of their several newspapers, and that its intention was to abandon the news collected by them to the public after its first publication by its first publishing member.)

National Telegraph News Company vs. Western Union Telegraph Company, 119 Fed. 294:

The appeal here was for an injunction to restrain the National Company from copying news from tickers operated by the Western Union Company.

The differences between this case and the case at bar are as follows:

In the case at bar, the complainant delivered its news to its members (for a consideration stated as an assessment) for publication wherever the paper might go; and for sale, **without restriction**, to any person who might buy that news in that paper.

In the Western Union case, the Company furnished to its patrons (for a stated consideration) information delivered in their places of business, for the use of such patrons and the persons who might resort to their place of business, and for that purpose only, and without permission to its patrons to publish or resell the same except as stated.

In the case at bar, the delivery of the news is made to complainant's members for the specific purpose of publication and sale to the world.

In the Western Union case, the ticker information was delivered to the specific patron for a **restricted use**, and was not delivered to the specific patron for publication and sale to the world without restriction.

In the case at bar, the defendant became possessed of complainant's news by purchasing it in the columns of a newspaper of complainant's members, whom complainant had authorized to publish it to the world.

In the Western Union case, the defendant abstracted the news from the Western Union carrier in the act of its service to the Western Union Company's patrons under a contract for its **limited** use, and without authority for the general publication and sale of the same.

In the case at bar, complainant's individual members are its distributing sales agents of its news and publish it and sell it with complainant's authority.

In the Western Union case, the delivery was to the Western Union Company's patrons for a single use, the patron not being a publishing or sales agent of the Western Union, and being without authority to sell the news delivered to him by the Western Union.

In the case at bar, every member of complainant

is an integral part of its corporate entity, and when such member publishes and sells the news furnished to it by complainant its act of publication and sale is that of complainant.

In the Western Union case, there is no such relation between the Western Union Company and its patron, but, on the contrary, the relation is that of the one who furnishes information, by a common carrier, for a limited use, and the person who buys it for that limited use. For example, when the New York Times makes a publication of news furnished it by complainant, complainant makes that publication because it is made by one of complainant's component parts authorized to do that particular thing.

The complainant, by its own theory of its organization, authorizes its volume of news for **unrestricted** sale to hundreds of communities throughout the United States through the instrumentalities of its members. The first publishing member of the complainant makes the first sale to the public and that sale constitutes a complete dedication of that news to the public.

In the Western Union case, the Western Union Company sold its own news to the defendant in that case, who was the purchaser of that news for a **limited** use and is without authority to publish or sell the same.

It is clear, therefore, from the foregoing, that the publication of complainant's news by one of its members, or by complainant, in any community, constitutes an abandonment of that news to the public.

In the Western Union case, that Company's sale to an individual patron only constituted an abandonment of that news to that patron subject to the

limitation imposed and for the restricted use implied.

The abandonment in the case at bar was authorized and unrestricted. The "abandonment" in the Western Union case was to a single patron for a limited use, which did not constitute a dedication to the public. The sale by complainant of its news as stated constituted an authorized abandonment to the public without restriction and hence an unqualified dedication to the public.

This Court should also draw this distinction. If the same remedy was invoked in the Western Union case, this Court would be dealing with a patron who had simply purchased confidential information for a restricted use without authority to publish or sell it to the world. In this case, the Court is dealing with a defendant who buys complainant's news in the open market from a member of complainant authorized to publish and sell it **without restriction.**

Kiernan vs. Manhattan Quotation Telegraph Company:

The facts in this case have been set forth, *supra*.

The differences between the Kiernan case and the case at bar are:

(a) In the Kiernan case the contents of the dispatches of the Telegraph Company were surreptitiously taken, were actually stolen, before they had been put to the use of publication for which they were gathered and compiled, and hence before abandonment or dedication to the public. They constituted an impairment of the value of the confidential service, or of the value of the instrumen-

tality for the gathering and dissemination of that news.

In the case at bar, defendant purchases complainant's news in the open market from complainant, or from a member of complainant, duly authorized to make that publication and sale.

Board of Trade of the City of Chicago v. Tucker,
221 Fed. 305:

(This is the case to which Judge Hough referred in his opinion.)

This case was one in which the Circuit Court (Judge Lacombe writing the opinion) imposed a fine upon the defendant for the violation of a decree of injunction which that Court had made.

The decree of injunction, which the defendant was alleged to have violated, prohibited him from using any of the quotations which the complainant supplied to a client for that client's limited use of blackboard display in its office, until he (the defendant) should have acquired the right to receive and use them, either

- (a) By contract or purchase of complainant;
- (b) With complainant's consent from some telegraph company authorized by complainant to distribute such quotations; or
- (c) Under a judgment or decree against complainant in a court of competent jurisdiction.

The distinctions between the facts and principles of that case and the case at bar are obviously as follows:

- (a) The sale to complainant's client was for the limited use of blackboard display in its office, with-

out authority to such client to resell the same or to use the quotations in any other than that specific manner;

(b) The publication made was a limited publication and not a general publication;

(c) The defendant did not purchase the quotations taken from a client or "member" of complainant authorized to make the sale thereof; and

(d) The quotations were surreptitiously taken, and not purchased and paid for in the open market with the consent of the complainant.

The distinctions clearly show the absolute inapplicability of the decision rendered in that case and of the principle enunciated based upon its facts.

The entire text of the opinion in this case shows the utter worthlessness of the *dicta* which Judge Hough extracted for the support of the rule declared in his opinion.

VII.

There is no case that holds that the voluntary publication of news or events of spontaneous origin in a single newspaper, sold and authorized to be sold, without restriction as to the use of the contents of such newspaper, does NOT constitute an abandonment to the public of the news so published.

VIII.

The complainant, assuming that it had a property right in its "trade secret" knowledge of news (which Equity will protect) lost that right by its authorized publication and sale thereof, as hereinbefore set forth.

Kiernan v. Manhattan Co., 50 How. Pr. 194;

Exchange Co. v. Gregory, 1 Q. B. D. (1896);

Exchange Co. v. Central Co., 2 Chancery (1897), 48;

Peabody v. Norfolk, 98 Mass. 452;

Dodge Co. v. Construction Co., 183 Mass. 62;

Board of Trade v. Hadden Co., 109 Fed. Rep. 705;

National News Co. v. W. U. T. Co., 119 Fed. Rep. 294;

Illinois Commission v. Cleveland Tel. Co., *ib.* 301;

Board of Trade v. Christie, 198 U. S. 236;

Board of Trade v. Cella, 145 Fed. Rep. 28;

Board of Trade v. Tucker, 221 Fed. Rep. 305;

Hunt v. Cotton Exchange, 205 U. S. 333.

Judge Ward, in his dissenting opinion, interprets the foregoing cases to hold:

"The distributor's knowledge of news which he has gathered is his property so long as he keeps it to himself, or communicates it only to

others on condition that they will do so."

"But if the distributor publishes, to use a word in this connection which I think has been unreasonably criticized, or abandons or dedicates or communicates his information to the world, his right of property in his information and his right to be protected against the use of it is gone."

The learned Judge stated the basic principle of the decisions in these cases to be as follows:

"In every one of these cases the Court found that the defendant got the news or the quotations surreptitiously, and enjoined him for that reason."

IX.

The defendant, assuming but denying that it had a property right in news which it collected while it remained in its confidential possession, lost that right by its authorized publication and sale thereof, as hereinbefore set forth.

The argument and authorities that support the foregoing proposition are set forth at Points V and VIII of this brief.

The argument and authorities referred to overwhelmingly justify the contention that complainant lost, by authorized publication and sale, whatever right of property or to protection it had in the information obtained by it, whether what it had is held to be "knowledge of news" or "news" itself.

The related propositions are stated separately to preserve the logical progression and completeness of the argument.

X.

Complainant's publication of its "trade secret" knowledge of news, or of its news, as hereinbefore set forth, was a publication without contractual reserve or restriction as to its use and constituted an abandonment of whatever property right it had in the knowledge of news, or in the news, so published.

The complainant imposed no property right restriction upon the news that it delivered to its "members", *except that they should not furnish it to others in advance of publication by them.*

The complainant did not require its "members", in publishing and selling its "news", or facts of news, which it delivered to them, to impose any limitation upon its use by the buyers thereof.

Complainant's "members", in publishing and selling the news delivered to them by complainant, imposed no contractual limitation upon its use by the persons (including defendant) to whom they sold it.

The buyer of complainant's news (the defendant was such buyer), under the circumstances stated, became the owner thereof, and could do as he pleased with the news he owned.

The defendant, as a buyer of complainant's news, or the owner thereof, could do as he pleased with it; and, therefore, could rewrite and resell it, or the essential facts thereof, as it saw fit.

XI.

The defendant has not been guilty of "unfair competition" with the complainant in rewriting and selling to its clients the facts of news which it bought in newspapers of complainant's "members", and which it resold, without any representation, express or implied, that such facts of news had been collected or prepared by complainant with whatever skill or accuracy it had a reputation for.

"Unfair competition" has been variously defined. It has been defined thus:

"The fundamental rule is that one man has no right to palm off as his own goods the goods of a rival trader, and 'he cannot, therefore', in the language of Lord Langdale in *Perry v. Truefitt*, 'be allowed to use names, marks, letters, or other indicia, by which he may induce purchasers to believe that the goods which he is selling are the manufacture of another person'."

(Nims on Unfair Competition, Second Edition, Section 4, page 12.)

Another definition is:

"The essence of the wrong in unfair competition consists in the sale of the goods of one manufacturer or vendor for those of another, and if defendant so conducts its business as not to palm off its goods as those of complainant, the action fails."

(Nims on Unfair Competition, Second Edition, Section 90, page 174, and c. c.)

Judge Hough (preparing a radical departure from the established law of "unfair competition") thus defines it:

"In *McLean v. Flemming*, 96 U. S. at 251, a decision which is near the foundation of American case law on this subject, it was said that what equity enjoins the wrong-doer from depriving another of is 'the advantage of celebrity'. This thought has led to the feeling that what a plaintiff must be robbed of is the good will and business ease resulting from his well known name, or the attractive dressing, wrapping or form of his product; that such robbery must be by imitation; and that the test of such imitation is the effect of the public or that part thereof likely to require wares such as those in controversy."

(Pp. 199-200.)

Judge Hough, after stating the principles of the established law of unfair competition, as heretofore stated and applied, immediately extends those principles as follows:

"But this is not all the law, nor the only sort of unfairness in business methods, practiced by a competitor and resulting in a continuing tort for which the law affords no adequate remedy that comes under the protection of equity."

(P. 200.)

It may be stated, with due respect to the learned Judge, that his statement of the law was all the law until he made his statement changing and enlarging it.

It is not pretended that defendant, in rewriting

and selling the news it bought in newspapers of complainant's members, represented to its clients that the news it sold and delivered to them had been gathered by the complainant or obtained from the complainant; or that defendant, in any other way, took advantage of the celebrity of the complainant, or trespassed upon its good will or business ease.

The defendant bought, in the open New York market, the thing which was sold there (without restriction as to its use), by complainant's authority, and rewrote and sold the same, as its own, and not a thing that complainant had procured, prepared, published, or ever had anything to do with.

The complainant, prior to the decision of Judge Hough at Circuit, had no cause of action against the defendant for "unfair competition", as the law had been defined and applied since the establishment of the jurisprudence of the United States.

Judge Hough, however, coins a new and revolutionary concept, to meet this emergency, saying that,

"'Unfair competition', like all other legal phrases, has acquired rather a narrow use."

The learned Judge (after sweeping away the principles and landmarks of the law of unfair competition) proceeds to extend its frontiers, to cut away its rational foundation, its basic principles and purpose, with the effect of serving the clamor, use and interest of the plaintiff here. All this he does, with a phrase (which does not justify) that,

"Flexibility of equity in granting relief against unfair methods of business was well stated by Ingraham, *J.*, in *Barrell v. Marzeau*,

124 App. Div. 655: 'No hard and fast rule can be laid down, . . . where it is clearly established that an attempt is being made by one person **to get the business of another by fraud and deceit**, a Court of Equity will intervene . . . and in *Weinstock v. Marks*, 109 Cal. 529, it was said: 'Equity does not concern itself with the means by which the wrong is done; it deals with the **result of the fraud** which moves the arm of the law and strikes down all efforts where **fraud is practiced in securing the trade of a rival dealer**.'"

(P. 200.)

The learned Judge, therefore (as we have seen), finds, as the result of a metaphysical distinction, that facts of news are not public property, but may be private property; and emasculates the meaning of the word "publication", so as to deprive it of the significance that the Courts have always given it; and so subverts the reason and purpose of the law of unfair competition, as to bring a perfectly honest transaction within the scope of the law prohibiting fraud and deceit in trade, and grants a remedy which is not a legal remedy, but one that cures a defect in plaintiff's machinery, and eliminates an obstacle (the time differential) imposed by the laws of nature.

XII.

The complainant here has, as matter of fact, authorized its members, under its agreement with them as evidenced by its rules and course of conduct, to publish and sell in their newspapers the news furnished them by complainant as soon as it is received, and with no other restriction than that they shall not furnish such news to others prior to its publication and sale by them individually; and such publication and sale constitute an abandonment to the public.

The by-laws of complainant provide, among other things, that

“Each member shall be entitled, upon compliance with the provisions of the by-laws, to receive a service of news for the purpose of publication in the newspaper specified in his certificate of membership (Record, p. 16, fol. 63).”

(P. 11.)

and they further provide that each of its members agrees upon assuming membership:

“ . . . that no member shall furnish or permit any of its employees or anyone connected with its newspaper to furnish any of said news in advance of publication to any other person” (p. 8 of Record, subdivision second of the order appealed from). (See also, Record, fol. 64, p. 16.)

(P. 11.)

The foregoing rules of complainant, to which each member is required to subscribe, constitute the contractual obligation between the corporate

entity and the persons constituting its membership.

The rules quoted clearly show that the news furnished by the complainant to each of its members is furnished for publication and sale to the WORLD in the newspaper of each of its members, and that it is delivered for publication and sale by such member subject to **no other restriction** than that they shall not furnish such news to others prior to its publication and sale by them individually.

The complainant, by these rules, thus authorizes its member to publish to the world, to abandon to the public, without restriction, the "trade secret" of its news with the single exception that it shall not impair that "trade secret", the value of that secret and confidential news to others, until it is put to the use for which it is delivered, or until it has been published by complainant's member.

The voluntary and authorized publication of the "trade secret" of news, of secret and confidential information, constitutes, as a matter of law, its abandonment to the public.

The rules of complainant and its long-continued practice show that **there was an abandonment in fact, and an intended abandonment in fact, as distinguished from the legal effect of the act of publication.**

Judge Hough challenges the defendant's contention, that complainant's authorized publication and sale of its knowledge of news, or of news, as hereinbefore set forth, constituted such publication thereof as terminated, either expressly by contractual consent, or as a matter of law, whatever property right complainant had in such knowl-

edge of news, or in the news itself, or in the quality of *firstness* in its service.

Judge Hough's argument proceeds as follows:

"It may be granted that the newspaper first giving out the news in question is copyrighted, that fact statements are not thereby protected as such, and that publication at common law terminated an author's right in his manuscript and the fruits of his brain, yet

"It still remains true that plaintiff's property in news is not destroyed at all, that it is not capable of copyright, and that

"'Publication', as that word is used in the long line of decisions regarding literary rights, *has no determinative bearing* in this case.

"No one before ever attributed to publication a sense that would limit a lawful business to a few degrees of longitude.

"The word is legally very old and of no one certain meaning.

"The thought, however, running through all the uses of the word, is an advising of the public, the making known of something to them for a purpose. It follows that the crucial enquiry is as to that purpose, is it lawful?

"It appears that all 'publications' are not alike.

(The basis of this statement is a quotation concerning an expressly limited right of publication in the Tucker case.)

"The use of the word 'publication', without explanation or qualification, is unfortunate, and this is true even under the Copyright Act.

"The nature of the property in question in large measure determines the extent of the public right. Unless there was an abandonment of copyright or dedication to the public, the owner of the thing capable of copyright could expressly or by implication confine the enjoyment of such subject to some occasion or to some definite purpose."

These sentences run smoothly, and cause half-truths to sound as truths, and fallacy to ring as reason.

The writer analyzes and answers these several statements as follows:

Judge Hough's statement that, "*It still remains true that plaintiff's property in news is not destroyed at all*", is the recognition of a property right which no adjudicated case confirms, except the one which that statement in part adjudicated.

His statement that "'Publication', as that word is used in the long line of decisions regarding literary rights, has no determinative bearing in this case", is true only to the extent that it has no determinative bearing **(the determinative bearing that it has previously had in all of the pertinent cases)** because he will not permit it to have that bearing.

His statement that,

"No one before ever attributed to publication a sense that would limit a lawful business to a few degrees of longitude",

is true but not pertinent; the Judge might have added (with greater force) that publication is not a matter of either latitude or longitude; and that the publication which defeats an author's right in copyrighted property, or which by analogy of reasoning, defeats it in uncopyrighted property which cannot be private property, is just as perfect when made in one city as in twenty cities; for otherwise the fact of publication would depend upon the extent of publication, and there could be no publication which would defeat copyright which was not made in every city, or in every community of the sovereign state conferring the copyright.

His statement that the "*word publication is very old and of no one certain meaning*", is true and never more true than since the learned Judge

handed down his opinion in this case; and the writer presumptuously suggests that it has always been understood, in common sense and Equity, that if a person printed and circulated in a newspaper the literary fruit of his own brain or facts of news, that such printing and circulation was a publication of that matter under the law, copyright or **common.**

His statement that, "*It appears that all publications are not alike*", is true, but that does not mean that the printing and circulation of news or literary matter in a newspaper is not, either in common sense or equity, a publication of that matter.

His statement that,

"The thought, running through all the uses of the word (publication) is an advising of the public, the making known of something to them for a purpose. It follows that the crucial enquiry is as to that purpose, is it lawful?"

is, in so far as it is pertinent, without weight upon the argument. Certainly it will not be urged that the printing and circulation of literary or news matter in a newspaper is not an advising of the public, the making known to them of something which that matter contains. The writer insists, however, **that the crucial enquiry, where the fact and legal effect of publication is to be determined, is the character of the publication and not its purpose;** for illustration, if the author of literary matter caused it to be printed and circulated in a newspaper without copyright, that printing and circulation would constitute publication or the dedication of that matter to the public, even though the author only intended that the publication should be limited to the community in which the newspaper circulated and intended to later copyright the pub-

lished matter for its protection in other communities.

His statement is in part true that,

"The nature of the property in question in large measure determines the extent of the public right. Unless there was an abandonment of copyright or dedication to the public, the owner of the thing capable of copyright could expressly or by implication confine the enjoyment of such subject to some occasion or to some definite purpose".

The writer challenges the statement that the nature of the property right largely determines the extent of the public right, if by that it is meant that the nature of the property right largely determines the question whether a given publication constitutes an abandonment of that property right, because the writer insists that the fact of publication, and not the nature of the thing published, is the test of dedication or abandonment.

The major portion of the statement begs the question in this, that of course, if there was no publication which constitutes an abandonment or dedication, (such as there was here), an owner might confine the enjoyment of such subject to some occasion or to some definite purpose; as, for instance, the Associated Press might have communicated its news (as an illuminant) to a meeting of the Board of Directors of J. P. Morgan & Company, or it might have set it forth, in a confidential letter to an antiquary or a librarian or a police magistrate, under the seal of confidence and with the express purpose of limiting its communication to those persons.

Applying to matter that cannot constitute private property, the reasoning applicable to matter that may; applying to non-copyrightable matter the reasoning applicable to copyrightable matter; the

fallacies of Judge Hough's emasculation of the word "publication" is (as the writer believes) clearly apparent.

Assume:

An author of a book prints an edition of it without copyright, and turns it over for sale to a retail publisher of the City of New York, either

(a) With an express agreement that he may sell the books to any person that will buy them at his store in New York City; or

(b) That he may sell them anywhere in the United States; or

(c) Without any restriction being imposed upon the dealer's right to sell, or without anything being said about his right to sell.

Is it necessary to support with argument to this Court, the proposition that publication and sale of the book, under **any** of the conditions set forth above, would constitute such a publication as would defeat copyright.

Assuming that such a publication would defeat copyright, how does complainant's situation differ from that of the author of such a book?

The complainant delivers its news (uncopyrightable matter) to a newspaper in New York, with authority to it to publish and sell it in New York to whomsoever will buy it there, or wherever the newspaper circulates.

If that news was copyrightable, is there any doubt but that such a publication and sale would defeat the copyright? Would not such publication of that news defeat copyright, if it were copyrightable, as clearly as a similar publication would defeat the copyright of the author of a book?

The answers to these queries must be "Yes", un-

less a distinction is made that news is **not copyrightable**, while the fruits of an author's brain are **copyrightable**. Such distinction presents, however, the proposition that **uncopyrightable** matter is entitled to the protection of a Court of Equity against the effect of such publication, that **copyrightable** matter should not have.

Judge Hough, in the course of his opinion, makes the catchy statement that

"We discover no magic in the word 'publication' which takes away or terminates the rights of others."

The writer respectfully queries whether there is any magic in the word "Associated Press" which takes away or terminates the rights of others, or gives to it rights that others do not have, or entitles it to a refashioning of the established law relative to literary property and to unfair competition, which others have never dared to ask?

XIII.

The complainant authorizes its members to publish and sell upon receipt the news which it furnishes them, and to sell that news upon the street without restriction (if any could be lawfully imposed) upon its use by the person that buys it; so that when defendant buys the news furnished by complainant, in a newspaper published and sold by one of complainant's members, it (defendant) can do as it pleases with it. (There is no privity of contract between complainant and the buyer of the newspaper of one of complainant's members.)

The rules of the complainant show that it authorizes its members to publish and sell upon re-

ceipt news which it furnishes them, and to sell that news upon the street without restriction upon its use by the person that buys it.

The Court, in reviewing this case, should constantly bear in mind one essential and important fact, that its power is being invoked to enjoin the defendant from rewriting facts of news contained in a newspaper published to the world it (the defendant) has bought and paid for in the open market **without restriction** as to its use. This Court, in other words, is dealing not with the member or patron of complainant but is dealing with the patron's patron and is asked, by its right of injunction, to prevent the patron's patron from rewriting facts of information which it has bought and paid for **without limitation or restriction upon its use**. It is not claimed, it cannot be successfully contended, that plaintiff's members violate any rule of complainant, or any contractual obligation that they are under to complainant, when they publish the news obtained from it for they obtain it for the purposes of publication. It will not be claimed and it cannot successfully be contended, that when they sell the newspaper to the man upon the street, as for instance to the defendant here, that that contract still carries with it any obligation upon the part of the man upon the street, or of the defendant, to limit his use of the paper bought to the mere reading of the news which it contains, or to prevent them from making any such use of the information contained in the newspaper as they may see fit to make. There is absolutely no privity of contract between the man who buys the newspaper upon the street, as for instance the defendant, and the complainant here. This Court should also bear in mind this fact, that complain-

ant is asking it to enjoin defendant from making such use as it sees fit of news which **it buys and pays for and does not steal, of news which it obtains in the open market and does not appropriate surreptitiously, of news that it acquires absolutely WITHOUT LIMITATION as to its use and not of news that it acquires confidentially or under any imposed restriction as to its use.**

XIV.

The declaration of the rule for which complainant contends is against sound public policy.

Complainant, in its brief presented to the District Court, says:

"As a practical proposition, it requires no argument to show that the vast organization necessary to bring news items, accurately and swiftly, from every part of the globe, to New York and place them there in one single copy of a newspaper, cannot possibly be maintained if its exclusive commercial utilization is cut off the moment such news is published. No expenditure of \$3,000,000.00 and more a year can be made for a business return of the nothing which comes in from publication on such bulletin boards or the cent or two that comes from the sale of the first paper."

"Yet that is precisely the claim of the defendant here; and conversely they claim that as soon as we have received that much fruit of our expenditure and work, they are entitled to our product even for commercial purposes on a basis equal to us."

The foregoing is not an accurate statement of defendant's claim, but the writer, for the purposes of this branch of his argument, will assume that it is.

The foregoing statement clearly embodies all of the apparent strength of the complainant's claim for the particular relief which is under discussion here. It clearly shows the inherent difficulty of complainant's maintaining, under the law, an exclusive property right in news until after its publication by complainant's last publishing member, owing to the differential in the time of publication by its several members.

The complainant, basing its claim upon this apparent injustice, insists that the law should deny to every person the right to reprint from the columns of its members' newspapers, the facts of news furnished by it to its members, before publication by the last publishing member, even though three hundred or four hundred of them may have already published it, and even though the last publishing member may not go to press until five or six hours after the first publishing member has done so.

Passing legal questions as to the single publication and its effect, under complainant's contract with its members, the writer respectfully presents the following illustration:

A man devotes a great part of his genius and inventive skill for twenty years to the invention of a new and novel device of great public utility. Having invented it, he installs an expensive plant for its manufacture, and having manufactured it, he sells it to the public without having obtained a patent on it. Another man instantly manufactures and sells the same article, thus appropriating for his own profit the fruits of the inventive genius and labor of another.

Is not the inventor's "commercial utilization" of his genius, skill, labor and investment instantly cut off, or largely impaired, by the manufacture and sale of his device by another? Isn't this an apparent injustice vastly greater than that of which the Associated Press complains?

The Federal Law provides a remedy, in so far as it deems public policy justifies a remedy, for both such apparent injustices. It gives to the artist and author copyright protection of a work that is the product of their skill and genius; it gives to the inventor the patent law protection of the fruits of his own genius and enterprise.

The Federal Law gives neither to artist, author or inventor any protection, under the circumstances stated, if he publishes without resort to those laws, without having sought their protection.

There is no statutory law which gives to any person the right to copyright, to exclusively use, facts of news which he has either first ascertained at his own expense, or first published at his own expense.

Neither the English common law, prior to the Statute of Eighth Anne, nor our common law, of which the early English copyright laws are a part, recognize the existence of a right of property in facts of news embodied in a written narrative thereof.

In the English common law, rights of authors of a book or literary composition were replaced and limited by the statutes conferring copyright thereon.

Neither our common law, nor our copyright laws, recognize, or have ever recognized, a private property right in the facts of news.

Our copyright laws, replacing our common law rights of private property in the authorship of a

book or composition, constitute recognition of the only rights of private property in books or literary compositions which it is the policy of our Government to recognize or protect, and, exclude, by the failure to define and protect, the recognition of a private property right in news; and the Federal Courts have repeatedly held, apparently without dissent, that our copyright laws did not recognize or protect a private right in the facts of news.

Our law relative to private rights in literary property, both judicial and statutory, has been established for many years, and has always denied the existence of a private property right in news.

Our law is so clearly and definitely fixed (its principles, landmarks and frontiers are so clearly defined by reason and prescriptive authority), that it can only be changed (without judicial usurpation of Legislative power) by Congressional act.

A Bill was introduced in Congress to give news the protection which our law did not then and does not now afford, to incorporate in our copyright law the principle which complainant seeks to have established here.

Congress expressly rejected the recognition of that right in its protection, or the principle here involved.

Mr. Bowker, on that subject, says, pages 88, 89:

"In respect to news, there is no provision in the new code (Act of 1909). A bill to protect news for twenty-four hours was at one time before Congress, but was never passed."

There is no statutory law that provides that one person may not rewrite and reprint facts of

news first ascertained and published by another, under copyright, or the taking of other statutory steps.

The law does grant copyright protection to the products of the creative genius of artists and writers.

Is it not fair to assume that the copyright and patent laws, and the failure of the laws (the express refusal of Congress) to give protection to first-ascertained and published facts of news, are responsive to the fundamental thought, to the underlying public policy, that no person shall have any exclusive right in fact of news, even though they first ascertained and first published them?

This Court must determine the Public Policy with respect to the recognition of the rights here asserted, in the light of English and American common and statutory law; in the light of our judicial and statutory law; in the light of the laws which Congress has enacted, as well as in that of those which it has refused to enact.

The definition of Public Policy is not a matter of judicial notion or caprice; it is a matter of deduction from the established judicial and statutory law relative to the recognition, or non-recognition, of the right asserted.

It is the public policy of the United States that great news events of the world shall not be private property; that knowledge of the great news events of the world, and of those of this country, shall not be private property after it has ceased to be confidential, and especially after it has become, by publication, public property; that information of the great news events of the world and of our own country shall pass rapidly, without

impediment, for the enlightenment of the masses of our Democracy, to all of its people, whether they are or are not subscribers to the newspapers printed by the members of the Associated Press?

XV.

This Court (in passing upon the propositions to which this Argument is directed) should bear in mind the far reaching effect of the decision and the decree which the complainant asks it to make.

If this Court should hold that the defendant here cannot rewrite or sell the news of complainant which it buys upon the street in newspapers of complainant's members, until complainant's last publishing member shall have had a reasonable opportunity to realize the full commercial value of that news, or its quality of firstness; then, by the same reasoning, no morning newspaper can lift the facts of news, contained in a local or telegraphic story, not received from the Associated Press, until the morning newspaper from which that news is taken has had a reasonable opportunity to realize, by sale to its last purchasing subscriber or customer, the full commercial value of that news; and no evening newspaper, published in any city, could lift any such matter from an early edition of another evening newspaper and publish it in its own later edition, until the day is done, or until the evening newspaper from which the news is taken has had a reasonable opportunity to realize its full commercial value, by sale, on that day, to its last purchasing subscriber or customer.

No news agency or newspaper could take local or telegraphic items of news, printed and published in newspapers represented in complainant's membership, though not furnished by complainant, until complainant's members and complainant (whose by-laws require that news to be furnished exclusively to it) should have had reasonable opportunity to realize the full commercial value thereof.

This Court should also bear in mind that the decree here sought must be, if it is to be effective, that defendant cannot obtain, write and sell facts of news, either domestic or foreign, from individuals who have obtained it from the newspapers of complainant's members, who obtained it from complainant, unless the defendant first reads every one of the newspapers represented in the complainant's membership and knows that the information which it obtains from such individual was not obtained by that individual from a newspaper which so obtained it from complainant.

The effect of the decree here sought would be to bar the defendant from asking an individual concerning his information relative to facts of domestic or foreign news, or from selling the same, except at the peril of punishment under the decree sought, unless he shall have first ascertained whether that individual obtained that news, directly or indirectly, from the complainant here.

XVI.

The complainant is here seeking, not an application for its relief of any principle of existing law or equity, but the declaration of a new principle in derogation and amendment of the existing law and equity; its application is really one for new law, and not for the judicial interpretation and application of existing law; it should be made to the legislative and not to the judicial department of government.

The complainant also asks this Court, as the basis for entering the decree here sought,

(a) To recognize a right of private property in news, by whatever sophistical term it may be designated, which the law now rejects;

(b) To recognize a right of **private** property in private knowledge of news afterwards **sold and made public**, which the law now rejects;

(c) To recognize and protect a quality of news service called "firstness", which is but an indirect way of recognizing and protecting that private property in news (and news *published and sold*) which the law rejects;

(d) To extend the scope of the copyright statutes by giving uncopyrightable matter the same protection that, or a greater protection than, copyrightable matter has under the copyright statutes;

(e) To violate the underlying public policy of the copyright laws (which define and protect all of the rights of property in literary matter which it is

the policy of the State to recognize and protect) by giving "copyright" protection to news matter which is not copyrightable under the statutes, and which is not a private property right at common law ;

(f) To so limit the meaning of the word "publication", as to deprive it of the significance that the courts have always given it; and to strip the fact of "publication" of the legal effect that the Courts have always attached to it;

(g) To extend the scope of the law of unfair competition beyond the reason and purpose of that law by

(1) Bringing a perfectly honest transaction within the scope of the law prohibiting fraud and deceit upon the trade, or trespass upon the celebrity and the good will of another; and

(2) By the granting of an injunction, under the guise of a prohibition upon "unfair competition", which is really directed to cure a defect in plaintiff's machinery of news distribution and to eliminate an obstacle (the time differential) imposed by the laws of nature.

The complainant's application should be made (as stated, *supra*) not to the judicial but to the legislative department of government. It should be for an amendment of the existing copyright law by Congress, and not by the Courts.

XVII.

The bona fides of complainant's action and prayer for relief is tainted by the fact that it invokes the protection which it here asks, the enunciation of the principles for which it here contends, for the first time in its history, and at a time when it believes (because of the adventitious circumstances of the ban which the Allied Powers have put upon defendant), it may deprive defendant of what both it and defendant have hitherto recognized as a legitimate and proper source of news.

This court should bear in mind the fact that the complainant, through all of its long life, has acquiesced in the use by other news agencies and publications of facts of news appearing in the early editions and in the bulletins of its first publishing members, and that it now, for the first time (when it believes that it can strike its competitor a severe blow), invokes the aid of a court of equity to declare and protect its alleged property in the facts of news which it furnishes, after publication, between the period of publication by its first publishing member and by its last publishing member.

This court should bear in mind the fact that complainant has utilized the contents of dispatches published by other news agencies and other publications, in the same way (or practically in the same way), during the whole period of its life.

Complainant's long-continued acquiescence in this practice of others, and complainant's long-continued practice of doing the same thing, justify this court in finding:

(a) That complainant, as a matter of fact, abandoned its own news to the public with the publication by its first publishing member, and intended so to do; and that

(b) Its complaint of defendant's use of its news, under these circumstances, after complainant's abandonment of its news to the public both as matter of fact and of law, is tainted with bad faith.

XVIII.

It is respectfully submitted that that part of the order of the Circuit Court to which this supplemental brief relates, should be reversed.

WILLIAM A. DEFORD,
Solicitor for Defendant.



APR 20 1918

JAMES D. MAHER;
CLERK.

Supreme Court of the United States.

OCTOBER TERM, 1917.

No. 568.

221

INTERNATIONAL NEWS SERVICE,

Petitioner-Defendant below,

against

THE ASSOCIATED PRESS,

Respondent-Complainant below.

SEPARATE BRIEF FOR COMPLAINANT.

STETSON, JENNINGS & RUSSELL,

Solicitors for Complainant,

15 Broad Street,

New York City.

PETER S. GROSSCUP,

Of Counsel.



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Supreme Court of the United States

OCTOBER TERM, 1917.

No. 568.

INTERNATIONAL NEWS SERVICE,
Petitioner-Defendant below,

AGAINST

THE ASSOCIATED PRESS,
Respondent-Complainant below

SEPARATE BRIEF FOR COMPLAINANT.

The Associated Press, the respondent in this case, is a corporation organized under the laws of the State of New York as a membership corporation. Its business is to gather news, partially through its members and partially by independent instrumentalities, and to distribute such news to its members. The membership is something over 900 (1,030, as a matter of fact), and the expenditure, outside of the services of its own members, is something over \$3,500,000 annually.

The petitioner is a corporation organized under the laws of the State of New Jersey, whose business likewise is to gather news and to distribute the same to such newspapers as will purchase it at the prices agreed upon, the difference between respondent and petitioner in that respect being that one has something of the characteristics of a mutual company and the other is a direct merchant in news.

In the suit in the District Court the respondent charged the petitioner with appropriating the respondent's news in three ways:

(1) By paying an employe in one of the newspapers served by respondent to furnish news to the petitioner, both local news and news coming in over the wires, the latter as rapidly as it came into the office over the wires of the respondent;

(2) By obtaining the news from the *New York American*, one of respondent's members, by taking it off of the Morkrum receiving machine, over which respondent's news was distributed to the *New York American* among other newspapers; and

(3) By procuring early editions of some of the newspapers published by respondent's members, and from them, and from the newspapers' bulletin boards, transferring the news into its contributions to its own customers.

What respondent asked the District Court to do was to grant an injunction broad enough to effectu-

ally restrain petitioner from continuing these practices. As to the first two charges the petitioner denied the facts and thereby presented to the District Court issues of fact upon those charges; but admitted that it took respondent's news from early editions of newspapers belonging to respondent's membership; justifying the same as its lawful right under the doctrine of dedication and abandonment by publication.

The District Court found against the petitioner upon both of the questions of fact thus presented, and issued an injunction restraining petitioner's further practices in that respect; but declined an injunction on the third charge—the one presenting the question of law only—for the reason, to quote the Court's own language in the order, "that although the Court is satisfied, both on the facts and the law, that the said practice is unlawful and inequitable, and that complainant is entitled to the injunction upon condition that it submit to a similar injunction in favor of the defendant, which it has offered to do, the legal question is one of first impression and should remain for decision by the Court of Appeals before an injunction should be granted." It was from the denial of that portion of the petitioner's prayer that the appeal was prosecuted in the Circuit Court of Appeals for the Second Circuit. We were met there by a cross-appeal from the injunctions upon the other two charges, with the result that our appeal was sustained and the cross-appeal overruled.

I shall not enter into that part of the record re-

lating to the cross-appeal, except to say that it was established beyond question that an employe in the office of the *Cleveland News* was under pay to furnish to the petitioner, by wire, as soon as received, the Associated Press news coming into that office, and that for this as well as the local news he received compensation from the petitioner. The correspondence in the record shows that this was done, not only with the knowledge of the petitioner, but in association with the manager of its Cleveland office. We believe that a reading of the affidavits will leave this Court in no doubt, as the Court below said it had no doubt, that complainant's news was pirated at Cleveland, and that such fact was not really questioned by petitioner in the District Court.

That one Atwood an editor of the petitioner and one Coates an employee wilfully came into the office of the *New York American* where the Morkum machine was bringing in the Associated Press news, and made copies or extracts therefrom, is also proven beyond doubt. And though, as stated by the District Judge (p. 180) the charge was strenuously controverted, it was to be noticed, the Judge said, "that no affidavit appears either from Coates or Atwood, who are the persons said to have secured complainant's news. This is very significant, and, in view of such an omission, the positive affidavit that such things occurred should prevail over defendant's affidavits from persons who simply swear, however positively, or even

truthfully, that they never witnessed such practices." And of course that observation is sound. It should be observed in this connection, however, that counsel for petitioner in the District Court below urged that, however conclusively those specified charges had been established, the Cleveland office and the New York office, in which they are said to have taken place, were only two of the thousands of offices through which The Associated Press news goes, and that therefore these instances should be looked upon as sporadic, and not evidence of a settled practice.

This attempted excuse omits one important consideration, namely, that the news to each of the thousands of Associated Press newspaper offices does not represent separate streams going into separate offices, but a single stream going through each office; and that a man placed in any one of these larger offices, like a man placed on the shore of a narrow strait between two large bodies of water, can observe everything that passes, without making a further survey of the whole circumference of the larger bodies. In a word, an observer in the office at New York or at Cleveland can be as effective as if the petitioner had an observer in every one of the thousand and more offices of The Associated Press.

This brings me to the portion of the order—the denial of respondent's third prayer—raised by our appeal. This Court, in *Baker vs. Sheldon*, 101 U. S. 105, has decided that, though the copyright statute extends to periodicals by the terms of the

statute, it is only "copyrightable matter" that can be copyrighted, citing favorably the remarks of Justice Thompson in a case at circuit (p. 105) to the effect that a market price list would not be copyrightable, the specific holding being that market reports, though included in the printed matter of the periodical, was not copyrightable matter. News as news—the fact, the event, separate from its literary or dramatic treatment—is no more copyrightable than a market report. This no one denies—it is expressly admitted by the petitioner. It is not to copyright, therefore, that petitioner can look for protection; for both practically and as a matter of law, news, as news—the fact, the event—does not belong there. What our contention is is this: That what the Associated Press does in the collection and distribution of news is a Service in which it has a right of property. A service is something that a person or corporation can sell and another person or corporation can buy. In that sense, and that sense only, it is a commodity. I am carried from here to Buffalo on the New York Central for which I pay a rate. What I have paid for is not an interest in the railroad's road bed or rolling stock, nor in the pasteboard called a ticket, but in that part of the service as a whole that carries me from here to Buffalo in comfort and safety. The road bed, rolling stock and ticket are only instrumentalities to that end. I receive a message from some one in California for which I pay the rate. I have not paid for the paper on which the message

was written, nor for the facts contained in the message. What I paid for was the service that took that message, three thousand miles away and laid it almost instantaneously before me. And so with the Associated Press. What it does in the gathering, transmitting, and distributing of information of the happenings throughout the world is Service. Like the railroad and telegraph, it has a charter from the State to perform such service. Like the railroad and the telegraph what it does is not a single instance of service, but a continuing service—the business of service. And, as in the case of patrons of the railroad or telegraph company, the newspapers, who are thus served, do not pay for the facts themselves as facts, but for the service that lays those facts before them as the earliest information on the subject. This distinction between service as a commodity—the service of gathering the facts, sifting them, and then laying them before the member newspapers—and the facts or events themselves, as facts or events, which petitioner insists is the commodity involved here, must be borne always in mind. The difference is not merely a difference in degree—it is a difference in kind. Our claim is not that the facts or events are something belonging to us; our claim is that the service that gathered them and distributed them is something belonging to us, whose commercial value as a business service the law will protect. And this distinction, while not doing away with all the confusion that runs through the cases, most of it verbal, will, we believe so dif-

ferentiate the cases, in the fundamental grounds on which they stand, that confusion need no longer exist.

News in this respect is different from a book or a work of art, or any disquisition on some scientific, artistic or historical subject. In such a book or work of art there is the element of permanency—the fact that, in a month, a year, or twenty years from now, there will be people who will wish to read or see the work and obtain its advantages. The value of the book is the original way in which the thought is presented. The commercial value of news, on the contrary, is not in the way the events are presented, but in its being the *first* to bring to the person's notice the happening of such event. The commercial value of news, as a service, is this quality of “firstness”. And the trespass that we complain of in this suit is that petitioner is taking away from us the commercial value of this quality—that by taking the news from our bulletins and from our first editions, and offering it to the public as its own, it is taking away from us the sole quality upon which the value of our service depends. Our contention is that the machinery set up by us to gather, to sift, to transmit, and to distribute news—the venture, the skill, the labor, the expenditure that, all together, make the service—is a service that draws to it the right of property; and that this right is trespassed upon and destroyed or depreciated by the petitioner seizing as its own the thing served—its quality of firstness—and thereby destroying the only value such service possesses.

More than that, however, while the persons for whom news is eventually intended are the individual readers of the newspaper, the member of The Associated Press, through whom all such news goes to such readers, is the newspaper of the community, the purveyor of news to the community as a whole. This fact must be kept in mind. One man, as an individual reader, may rise at 6 o'clock and read his newspaper at 7; another may not rise until 8 o'clock and not read his newspaper until 9. As between these two men, the one who rises at 8 has nothing new from the newspaper to impart to the one who has risen at 6. What to him was news when he read his paper has ceased for two hours to be news to the one who has read his paper, two hours before. As between these two men, the quality of "firstness" in news depends upon which one receives his paper first. But in relation to the newspaper—and it is the *newspaper* who is the recipient of our service—the community is to be considered as a whole; the man who rises at eight as well as the man who rose at six or was on the street, purchasing his paper as early as at 1 o'clock in the morning. To the newspaper,—and let me again say it is the newspaper who pays its money for the collection and distribution of this news—this quality of "firstness" is not a matter of a minute, nor of an hour, but of that whole period which, in the ordinary run of things, it takes the community *as a whole* to receive the news from the paper or papers it reads. In a word, that quality of firstness which gives news,

to the member newspaper, its entire commercial value, has what we may call a "time body"—firstness extended over time—that cannot be disregarded without disregarding the actual facts on which the commercial value of the news depends. We are not asking any exclusive right to merely communicate to the world the happening of events. We are not asking even that our own recital of events, as we gather them from day to day over the world, be regarded as exclusive for any extended period of time. Nor are we asking that individual people who read our news may not make use of it immediately for their own individual purposes. What we ask is simply that this quality of *firstness* in news, that gives it as a service its whole commercial value to the member newspaper, be recognized as ours, to the extent that it is the product of our labor, skill and expenditure; and that it be recognized as ours for the period that, as applied to the community served by a newspaper, rather than to the individual, measures its quality of firstness to the community as a whole, rather than to the earliest rising individual.

With the claim we make thus stated, let me go to the nature of the service in which the petitioner is engaged, and I do not know how I can do that any better than from the viewpoint of a reader of a newspaper served by The Associated Press.

I put myself, by way of illustration, not in the City of New York, but in one of the smaller cities, to determine what The Associated Press is doing for me as one of its readers. I spend the summer

usually with my daughter in San Diego, in California, and I read there a paper served by The Associated Press. One of my interests—perhaps one of my first interests—is in the local news of San Diego, including Coronado, where my daughter and her friends live. I get that news in the local paper there, the San Diego Union.

The local news are collected by the local reporters of that paper. In the larger cities, like New York and Chicago, they are collected likewise by local press associations. The Associated Press has nothing to do with the distribution and reproduction of those local news in those local papers. But each member of the Associated Press in that locality is under a contract obligation with the Associated Press as such member to furnish to it the local news that he has gathered in that vicinage; and it is such local news, thus gathered by the local member and passing through the office of The Associated Press—subject to such revision and winnowing as the superior officers may give to it—that goes out and becomes the communication of The Associated Press to its members outside that locality.

I am interested also in the news of my state and of my country. I find in that paper extensive despatches from Washington, from New York, from Chicago, from wherever I have an interest. Those have been gathered by the local members of The Associated Press, have been given to the offices of The Associated Press in those places and sent over the wires to that paper, so that I am being served

by The Associated Press through its local members, through the thousands of reporters, through the many offices it has established, and through the skill that it has put into those offices,—in getting intelligence of what is happening throughout the country.

But I am interested beyond the state and the country: I am interested in what is taking place in the world. There are four great agencies in the world—the Reuter agency, which was the first established, is one. Julius Reuter, a native of Prussia, in 1849, began the business of collecting and distributing news. That agency has grown until now it serves Great Britain and all Great Britain's colonies, including India, Egypt, China and Japan, allied with Great Britain in economic respects; Australia and all that territory that is under or allied with the British flag, except Canada.

Then there is the Havas Agency in France, which collects the news from the Latin countries—France, Spain, Portugal, South America and the like.

Then we have the Wolff Agency with its headquarters in Berlin, which collects the news from the Central and Slav countries.

Then there is The Associated Press of this country.

Now, The Associated Press has in Europe, Asia and Africa, and wherever anything may happen that interests mankind, agents of its own. It has a number of agents to-day in Russia. Those agents collect the news that they think will interest

Americans. Besides that, The Associated Press has a working agreement with these other agencies, by which the news that they collect—if it is news that is not likely to be colored by partisanship or national pride—is sent to this country. So that if a fire of worldwide importance or interest occurs at Benares, Reuter's will telegraph it to Calcutta. It will be telegraphed from there either to London or to Melbourne, or to some other place within the British dominions, and from there The Associated Press, by reason of this working agreement, will get it and telegraph it to the United States; so that I, out there in the southwest corner of the United States, in a little town of not a hundred thousand people, am being served by this agency, through the thousands of its reporters in the different towns, through the hundreds and thousands of its members, and through its agencies and the agencies and reporters of all these other great news associations all over the world.

The Associated Press service is costing, as the record shows, not appraising the value of these local collections of news, over three millions and a half of dollars annually, and the service is sent, as the record shows, to over nine hundred members; as a matter of fact, at the present time, to 1,030 members.

Now, is there in this Service—the venture, the skill, the labor and the expenditure of thus collecting and distributing news—the element of service that draws to it the right of property; and is such service, its commercial value being the quality of

firstness, as applied to the community served by its members, a service the courts will protect? That is the main question presented by the petition.

Seizing upon the word "publication"—a word that can be used, in its broad literary sense, to express the fact of the spreading of the respondent's news through its member newspapers before the eyes of its particular public—the petitioner attempts to utilize it in the same sense in which the word, used in a specific legal sense, is used to defeat property *in authorship*. The effect of this, of course, if the word is to be used in its specific legal sense the same as in its broad literary sense—the two senses in which it is used to be constantly interchangeable—is to destroy the entire value there is in respondent's service; for, if petitioner can thus appropriate what it has gathered from the first edition of respondent's members' newspapers, it can lay respondent's gatherings on the breakfast table of nine hundred and ninety-nine out of a thousand readers, through newspapers that do not belong to respondent's association and do not contribute to its service. As the District Court in its opinion said, petitioner does not seriously question that we have a right of property. But it loads down this recognition with what appears to us a misuse of a word that, if held to be rightly used, would annihilate that right the moment it begins to fructify. The just mind must at once feel, if it does not see, that there is something wrong in such a paradox. And it seems to me that feeling is turned into sight, the moment we clearly visualize just what respondent

ent's right of property is, and just to what the application of that word "publication" as a historic term in the law, can properly be made. That means that we must carry in mind what constitutes property—the fundamental considerations of the individual in society out of which it grows and on which it is founded.

"The savage", says Gibbon, "who hollows out a tree, inserts a sharp stone into a wooden handle, or applies a string to an elastic branch, becomes, in a state of nature, the just proprietor of the canoe, the bow or the hatchet. The materials were given to all; the new form, the product of his time and single industry, belongs solely to himself." And as far as this goes, it describes accurately the material side of the origin of property. But in the last analysis, the canoe, the bow and the hatchet are only the outward result—the record carved in matter—of the idea, the skill and labor exerted—as musical notes on the published sheet are only the outward record of what has gone on in the composer's brain.

The true basis of property is not so much the outward result—the record—as the inner effort producing the record; the recognition by society of the individuality of the creative process—a recognition that works itself out by setting apart to the individual the outward result of that process, whether it be something tangible, like the canoe, or something intangible, such as a mere service to others, accomplished through foresight, skill, labor and capital, directed to a specified end. In a word, the moral element on which the conception of prop-

erty rests must be included as well as the material element—the conscious recognition by mankind that what one individually adds to the stock of mankind, either physically tangible, or in the way of organized service, as the result of individual thought, effort, and expenditure, is something morally belonging to him, as distinguished from what belongs to mankind at large. When the male seals arrive at the Priboloff Islands, days in advance of the females who are delayed by the burden of carrying their young, each appropriates to himself a retreat in the rocks which becomes his own. But it is only physical might that is behind that “own”. Only by the recognition of the moral concept I have named does property become man’s “own” as distinguished from the animal’s “own”. “Property is indeed, in some sense”, says Sir James McIntosh (quoted by Mr. Justice Campbell in *Dodge vs. Woolsey*, 18 Howard 375), “created by act of the public will, but it is by one of those fundamental acts which constitute society. Theory proves it to be essential to the social state. * * * The property of individuals is established on a general principle, which seems coeval with civil society itself”.

“Government does not create the idea of right, the origin of rights; it acknowledges them just as government does not create property; it acknowledges and regulates property.” Bouvier.

“Civil rights, including the right of property are different in origin from political rights.” In other words, property grows out of the fun-

damental consideration on which society rests as well as on specifically expressed public will. An illustration of those two *sources* of property existing side by side—the one finally superceding the other—will be seen when we come to property in authorship. The world was a long time in coming to the recognition that the right of property included that which is only mentally tangible as well as that which is physical—the moral concept of individual creativeness, whether it resulted in something physically tangible or only mentally tangible. In Rome, for instance, the book or poem did not belong to the author by virtue of having sprung from his brain; it belonged to the owner of the papyrus on which it had been written, because the only thing that could be seen or touched was the papyrus. In the earlier stages of society, property in what we now call contract—the purely mental act of coming to specific agreement between men respecting matters present and to come—was unknown. Such mental acts could not be visualized; they had no body. It remained for modern law to perceive that things that had no physical body—only employed physical bodies as instrumentalities to their ends—could be legal entities; as clear cut and distinctive, and as complete in themselves, as things that can be seen by the eye or touched by the hand. Indeed, the economic side of society rests with more weight today upon this intangible factor—specific agreement between men as mental entities—than upon all the things put together, perhaps, that have

physical body. In this way mental acts as embodied in contracts have come to be "things"; and property has come to embrace whatever may minister to the wants or pleasure of another, which does not become due by reason of a mere personal relation such as domestic rights, suffrage and the like.

Let us follow that out a little further. I build up a practice in medicine or law, or acquire a standing as a minister in the church or a teacher in the schools—careers of service in which nothing physical is employed, except a few books and a little bit of furniture. It is called a vocation or an occupation. It is, however, so far as I am concerned, as a means of livelihood for myself, and for my family, just as much a thing—an entity—as the soil from which others may obtain their livelihood, or property evidenced by securities in their vault, from which they cut the coupons. The fact that it is only mentally tangible does not deprive it of the quality of property. *Dwight vs. Hamilton*, 113 Mass. 175. 5 Wall 74. It is subject, of course, to regulation by the State. I may not practice law until I have passed a stated examination and have shown myself to be of good moral character; nor may a physician or a teacher practice his calling except under like regulation. But the right established, it remains a right in the nature of property; so much so that within the provision of the Constitution of the United States, that life, liberty or property shall not be taken except upon due process of law, it is treated as a distinctive right in the

nature of property, of which the states may not deprive me, or even circumscribe, except by the exercise of such police power as has a reasonable and substantial relation to the public welfare. Indeed, in the Cummings case, and the Garland case, in 4th Wallace, it was held that this power to regulate by way of licensing was not a power to prohibit or destroy. In the Garland case it was held that a man's right to practice law was not a mere privilege, but a right, which could not be taken away from him, even by so fundamental an instrument as the Constitution of his State, or by an act passed by Congress, but only by such an inquiry, *in the nature of a judicial inquiry*, as disclosed that he had forfeited the right. And it has been held that a professor holding his office under a chartered college has a property right in his professorship.

Or, take the thing known as the "species of property," upon which the doctrine of unfair competition in the sale of commodities is based. I will take as an illustration the Williams' soap case, much like the Baker chocolate case, decided in the Court of Appeals for the Seventh Circuit. After the earlier Williams had obtained a leading place in the market by the quality of his article and the publicity he had given it, another man of the same name undertook to put his soap—a shaving soap also—on the market as "Williams soap". On the one hand, it seemed unjust that the one who had infringed no right of the other, except in the use of his own name, should be debarred from doing

what was lawful in his own name. On the other hand, it was manifest that to allow him to do so would be to permit him to eat into the trade built up on the reputation of the other's product. The Court did not seek to destroy the commodity of either, but granted an injunction which required the latter Williams so to place his name on his product, and the conditions under which his product was offered, that the public, in whose consciousness the words "Williams' soap" was identified with the product of the earlier Williams, would be adequately informed that the product of the later one was not in fact the product of the earlier.

Now, what was the species of property thus protected? To call it a trade name, or good will, is a mere effort to classify it into known terms in the law. The substance of the earlier Williams' species of property is in the fact that, by the combined effect of desirable quality in the thing produced, and the means of bringing such quality to the attention of the public—all of which required thought, skill, labor and expenditure—he had created in the consciousness of the public just that sense of identity that at once linked up as the earlier "Williams' soap" any soap called by that name, unless plainly differentiated. In a word, the earlier Williams had planted something, not in the earth, but in the mind of the public, that the law says is his, as long as he is ready and able honestly to keep, to cultivate, and to gather from it. In a large sense, such property is a created "state of mind" respecting a specific commodity. But like

property in the mental act of agreement between men, and like property in the pursuits that men have built up, that are themselves only mentally tangible, this state of the public mind respecting the particular commodity was an individual creation, and as such falls under the concept—nothing else standing in the way—that that which one has created belongs to him, in law as well as in good morals.

The courts have already decided cases, however, much closer even in detail to the case at bar, than the existence of property in the physically intangible things to which I have referred. Take the case of *Board of Trade vs. Christie* (198 U. S. 236). The Chicago Board of Trade is to the exchange in grains and the like what the New York Stock Exchange is to the exchange in stocks and other securities. Transactions there are carried on between brokers, who meet in the pits and, by a system of symbols, buy and sell from each other at certain prices. The tide of these prices as a whole is of course constantly rising or falling, and every rise or fall is taken by a telegrapher, put on to the wires, and reappears instantly on the tape of the grain brokers' offices in every considerable city in the United States; from which it is transferred to a blackboard in order that it may be observed, or, as counsel in that case insisted, "published", to any one who might come into the office. The object and effect of this service was to give to the Board of Trade a national character and bring into its transactions every one, no

matter where he was, who wished to deal in those commodities. And the advantage that grew out of the expenditure necessary to maintain this service was that the members of the Board of Trade in that way got their brokerage out of the transactions that took place throughout the entire country. The charge against the Christie Company, which the Court found sustained, was that it sent into these brokers' offices persons who copied the quotations from the blackboard, which the Christie Company, as soon as possible afterwards, used as quotations in the bucket shops with which it was connected. And upon these facts the Supreme Court held that the Board of Trade had a species of property in the service of which these quotations appearing on the blackboards of its affiliated brokers throughout the country were the record, which was trespassed upon by the Christie Company; and upheld an injunction restraining the Christie Company from continuing such trespasses.

Now, exactly what is the basis for the right thus upheld? Justice Holmes *likened* it to a trade secret. But though each brokerage house was under contract to use such quotations only in connection with its own customers, the obtaining of such quotations from the blackboard by the Christie Company was not through a breach by such brokers of such contract confidential relation; for the Board of Trade unquestionably understood that the quotations were to be thus publicly posted. The injunction, therefore, was not strictly in line with injunctions against the betrayal of trade secrets by those

under contract to observe them. Nor did such quotations have any permanent commercial value. In an hour or two their commercial value was gone. Like news, as I have already tried to define news, the commercial value of these quotations was in their quality of "firstness"—the fact that they were *first* to record what was going on at a distance. And to take them, as the Christie Company took them, was not a trespass upon what the public, as a public, had a right to know; for the purpose of their being put upon the blackboard was to let the public know. Undoubtedly the real basis of the right upheld was, that Christie, for commercial purposes, was taking away from the Board of Trade and its brokers the commercial value of this quality of firstness which gave to the service its only value.

Another case is the *National Telegraph News Company vs. Western Union Telegraph Company*, 119 Fed. 294, decided by the Circuit Court of Appeals of the Seventh Circuit. In that case the service of the Western Union Telegraph Company was to collect contemporaneous news, such as that relating to baseball, races and the like, and to transmit it to the tape, placed in the places of persons who paid for such service. The defendant, having access to such tape, along with the rest of the public, employed the news thus communicated in a like rival service of its own to patrons of its own. That case was decided by Jenkins and Grosscup, Circuit Judges, and Bunn, District Judge, and contains a note at the foot that both the decision and the record were read and studied by Baker,

Circuit Judge (now the Presiding Judge), and were fully concurred in. Being a case of somewhat first impression, Judge Baker, one of the ablest judges on the Federal Bench, did not wish it to go out as the law of the Circuit without giving it the same study as if he had personally sat in the case.

That case, like the Christie case, is very closely a parallel of this case. In both that case and this the service involved is the gathering and distribution of news. In both that case and this the public was in view, as it was also in the Christie case, as the party to whom the news was to be ultimately presented. In both cases the service is not direct to the public, but through intermediary customers, who pay in the case here for such news, and received in return their pay from the public, and in the case in the Seventh Circuit, by attracting people to the places where the tickers can be found. In both cases this service cost effort, skill and expenditure—in the case at bar much more than in the telegraph case. And in both cases the trespass charged was practically the same—in the telegraph case that the defendants had been appropriating *vi et armis* the news appearing upon the complainant's tape, and thereupon, with the loss of a few moments only, redistributing such news over their own wires and tickers to their own patrons; in the case here, that appellee has likewise *vi et armis* been appropriating appellant's news and redistributing the same over its own wires to its own customers. In the Telegraph case, as in the Christie case and the case of *Board of Trade vs. Tucker*, 221 Fed. 305, the property right, though the facts

were somewhat different, was distinctively recognized; the only difference of treatment between the Telegraph and the Christie and Tucker cases being that in the Telegraph case it was expressly stated that publication, as that term is applied to the Copyright Act, as a limitation upon the right in authorship, did not apply to the facts there presented, while in the Christie and Tucker cases it was held that publication—whatever might be the applicability of the word as a term in the law to cases of this character—did not amount to dedication or abandonment to the public, because it was not so intended; *because it was not so intended*—let that be remembered.

Another case is that of the *Dodge Company vs. Construction Company*, 183 Mass. 62, involving an injunction to protect the Dodge Company against appropriation of information collected by it, for sale to subscribers, relative to the erection of buildings. The facts embodied in such information—the facts *as facts*—before the Dodge Company had ascertained them, “unless they are held for a special purpose, confidentially and as secrets”, the Court says, “are not property, but when these facts have been discovered promptly by effort, and at expense, and have been compiled and put into form, and are of commercial value by reason of the speedy use that can be made of them before they have obtained general publicity, they are property. They represent expensive effort and valuable service, and, in the form in which they are presented to subscribers, they may be used with

a reasonable expectation of profit from the early possession of them." "The information is not visible, tangible property, but there is a valuable right of property in it which the courts ought to protect in every reasonable way against those seeking to obtain it from the owner without right, to his damage. * * * That there is a right of property of this kind has been decided in England in regard to information of stock quotations and other different kinds of news obtained to be furnished to those who will pay for it."—Citing the English cases, and also the *Christie* case and the *National Telegraph* case already referred to.

That brings me to the one stumbling block in what would otherwise be a clear pathway—the natural groping of the legal mind for analogies, which leads to the confounding of the property right at the bottom of respondent's case with the property right involved in authorship, and the consequent employment of the legal term "publication", which, as a specific legal noun in the law of copyright, means one thing, and as a word in its broad literary sense, means another and an entirely different thing, in its application to the news service here under consideration—indeed, also, in its application to another phase of the copyright law itself. That authorship gave to the author at common law a property right in the thing produced, whether a literary production, music, or any other child of the brain, has been established in England in the two leading cases, *Millar vs. Taylor*, 4 Burrows, 2303, and *Donaldson vs. Becket*, 2 Bro. P. C.

129, the first in the King's Bench and the second in the House of Lords. And that there was such right of property in authorship at common law has been recognized in our Supreme Court, especially in *Holmes vs. Hurst*, 174 U. S. 82.

Now what has copyright *by Statute* done? The property right recognized at common law was the exclusive right to publish *in perpetuity*; and, notwithstanding the act of 1709, creating copyright, was held to be still the right of the author, in *Millar vs. Taylor*, 60 years after such first copyright act was passed—Lord Mansfield concurring with the three Justices who so held against the one dissenting. So, as thus interpreted, the Statute did not *take away* the common-law right of exclusive publication in perpetuity, but only gave *additional protection* to those who chose to take it under the provisions and limitations of the statute. Then came the case of *Donaldson vs. Becket* in the House of Lords which merely decided that, though there was property in authorship at common law, the copyright act of 1709 and its successors was meant, not to add to or modify such common-law right, as held in *Millar vs. Taylor*, but to *supersede* it. That is the whole effect of *Donaldson vs. Becket*. In a word, parliament transferred the right of property in authorship from its original moral basis—the fundamental considerations on which society rests—to a statutory basis, in order to meet the objections of the public, especially against its feature of perpetuity. And

perpetuity of the right of publication having thus been replaced by a reasonable period of exclusive ownership and publication, the bitter controversy that had originally arisen subsided. In this way the copyright act created something like a just balance between what the author thought he ought to have in the way of the right of exclusive publication (what the common law had given him), and what the public thought the author ought to have, considering the interests of general culture and advancement. Thus it will be seen that property in authorship was not originally of statutory origin, but, as in the cases in our brief, and in the case now before the court, was one of those legal entities granted by society that have their roots in considerations both of fundamental justice, and a broadly intelligent public policy.

What, then, is the office and function of the word "publication" in the decisions revolving around the statutes, that have replaced such original common-law right? Obviously, its use relates to the statutory right, not to the original right; for the original right was in perpetuity and could not be lost by anything short of express dedication to the public or abandonment. Obviously, too, the word "publication" was not to be used in its broad literary sense; for publication in its broad literary sense—the other considerations of the act complied with—was one of the things that the statute contemplated and was intended to protect. There is, therefore, in the consideration of these cases, "publica-

tion" and "publication", even as applied to the statutory right—the same word with two opposite legal result and motives—one the *object* of the legal right given; the other its *defeasance*.

There are such things as nouns in the law. A word, to be a noun in the law, must be a distinctive thing—must have a definite, fixed meaning. The word "publication" as used to defeat the property right given by copyright means, as a noun in the law, publication without compliance with the statute which the law ever since has construed as abandonment. And rightly so; for the Court having held that failure to comply with the statute is abandonment, such is as much a part of the statute as if written in words into the statute. But "publication" as a noun in the law, to defeat the right of property, unless the specific conditions precedent have been complied with, cannot be the same word as "publication" in its broad literary sense, which instead of being a defeasance of the right of property of the author, is the very act of the author, which the law of copyright is intended to protect and promote.

And so by what considerations of justice, or by what logic, or by what well-thought-out analogy, can that word "publication", in its capacity as a defeasance of a property right, where certain statutory conditions have not been complied with, be expanded into a defeasance of a right wholly apart from such statutory conditions, and where no dedication to the public, or abandonment, was in fact

intended, but, on the contrary, where the publication is publication in its broad literary sense, which it was the purpose of the copyright law itself, as well as of this news service, to protect and promote?

Counsel for petitioner seem to concede that publication has no meaning as a defeasance, even in matter covered by copyright, except as it means dedication and abandonment to the public—saying, in their brief, that news published in newspapers or on bulletins “to be read by millions is complete comprehensive dedication to the public”. But why? No reason is given by them except that what thus appears, is “published”. But why, by parity of reasoning, is not matter put into books for the public to read likewise “a complete comprehensive dedication and abandonment to the public”. It, too, is “published”. The book stores, like the newspapers and the bulletin boards, offer it unrestrictedly to the public. The only answer can be that such matter being copyrighted is not intended to be dedicated and abandoned; all of which, then, comes down to this, that publication is, or is not, dedication and abandonment, according *to intent*; the copyrighting of books showing that such was not the intent of the author; publication without copyright, in the case of copyrightable matter, being judicially interpreted as such intent.

But certainly aside from matter governed by the copyright statute, there is no room for such judicial interpretation. News as such—the fact, the event, separate from its literary or dramatic

treatment—is not copyrightable matter. Aside from matter governed by the copyright statute, whether there is dedication or abandonment depends, not on what has been interpreted by the courts, in copyright cases, as such intent, but on *actual* intent, exactly as in the case of authorship before the copyright statute had superseded the common law right. That is to say, that aside from matter covered by copyright the word publication, wherever it occurs, can be said to have been only used in its literary sense.

Indeed, the whole purpose of the transaction, out of which the right of property has grown, in the *Christie*, the *Tucker*, the *Dodge*, and the *Telegraph* cases, would be defeated by using the word “publication” as the equivalent of dedication and abandonment. It would be sacrificing the spirit to the letter. It would be even more. To apply the word “publication” to these business entities, so widely different from what it was intended to be applied to in the copyright law, as petitioner is trying to apply it, would not be merely a sacrifice of the spirit to the letter—it would be sacrificing the spirit to a word that might *itself* be used—and in the copyright statute is used—in the opposite sense; used as the thing to be protected and promoted, not the weapon to destroy.

Let me now, in a sentence or two, try to sum up. The business entity that constituted respondent's service is the thing called *news*—the communication of information of events contemporaneously

with their happening—the commercial value of which is its quality of *firstness*, not alone for each person individually in the community, but for the community as a whole. The service thus given creates in the respondent a right of property, and especially in the quality that gives such service its commercial value. Respondent does not seek to prevent the public from making personal use of the news served; on the contrary, that the public shall make such personal use is one of respondent's purposes, through its member newspapers. What respondent asks is that the quality that gives it *commercial value* shall not be destroyed or depreciated by invasion by another, whose sole purpose is not to make personal use of such news, but to *take away* from respondent this valuable quality. And the injunction asked for is for a period that will subserve that end. The petitioner offers no consideration appealing to any sense of justice, other, perhaps, than that it might be against public policy not to permit it to become a parasite on respondent's service. But is there public policy in permitting one to steal what another has created? Does public policy take no heed that if the parasite is given immunity to live, the thing on which it feeds may die—for unremunerative service cannot survive—and that with the death of the thing on which it feeds, it also will die. Is there in the whole history of industry—of the rivalries of men to minister to the comfort and the happiness of other men—a case in which the public welfare has

been subserved, or been believed to have been subserved, by giving encouragement to the vampire?

To state these questions is to answer them. Counsel for petitioner cannot seriously answer them in any other way. Indeed, the only substantial defense counsel for petitioner makes is, that in raking over the nomenclature of the law, they find a word, that, taken out of its setting—out of the statutory conditions to which it was intended to apply—can, by nothing more substantial than what amounts to mere *idem sonans*, make it the excuse for their piracy. Is the law, as a whole, such a weakling? Is the law—supposed to be a code of justice between men—only the slave of a word, or a plausible analogy? If so, perhaps we shall have to go back to the Courts below with an order that reverses the independent judgment of both courts. But in that event we will go back, we submit, with an interpretation of the law that withers the arm that was supposed to be strong against every wrong—that violates, in mere servitude to an analogy, the broadest consideration of fundamental justice and public policy.

Now what should be the relief granted? It should be in the form of an injunction, for the trespass complained of is a continuing one, under a claim of right, and no other adequate remedy is at hand.

It should be an injunction co-extensive with the injury inflicted. That is to say, respondent's exclusive right to the commercial enjoyment of its

property brought to the attention of the court, should be protected by an order that would give the quality of firstness a sufficient *body of time* for the respective communities that the respective papers serve, in order that each of such papers should be able to utilize that quality, not with its *first* readers, but *all* its readers, or all who might become its readers, within that community.

If you ask us what that period should be, our impression is that it should be for at least the space of a full day, for both morning and afternoon papers served by respondent. Further than that, in the way of detail, the order need not go; it is enough that for such period the petitioner should be forbidden from using respondent's product for any commercial purpose. I do not mean by that that the men who conduct petitioner's service must close their eyes or stop their ears to what other people are intended by respondent to see or hear, or may not use what they see or hear, as other people use what they see and hear, for their individual personal purposes. But there is a wide difference between that and using the product of respondent's service, either unchanged or colorably changed, as something open to them, for the commercial purposes of which we complain. I may go to light opera and coming home, play on the piano, if I have musical memory enough, the catchy music I have heard, even though it be copyrighted. I need not play it to myself alone—I may play it to my friends. I may find in it a key or clue to what, if it rise to the

plane of an original creation in music of my own, may become my own. But the law forbids me employing it, either literally or rewritten, for profit, even in the hotels or public restaurants where people go for entertainment, including music. In a word, I cannot commercialize it. And so with petitioner, if what its people see or hear put them *on the track* of news, they may follow out that track to where the news originated. But they cannot use that right as a cover for what otherwise would be the mere commercial piracy of respondent's service. And the question of what is good faith and what a mere guise, is one, not to be forecast in detail in the decree, but to be settled in every instance on motion for contempt. Were the respondent to send to its members, for instance, a despatch from London that Lloyd George had been sent for to form a cabinet, and petitioner had appeared immediately with a like despatch, under a London dateline, no one would doubt, in a hearing for contempt, the *animus furandi*, in case petitioner had received no such despatch from London at all.

It is not always that a private grievance brought into court has such an appeal not only to the sense of right and wrong, but the public interest as has the grievance we bring. Suppose petitioner should erect and equip with wireless telegraph instruments a mast on its own land, in the neighborhood of the wireless company's mast, and should in that way actually tap, but without physical connection, the

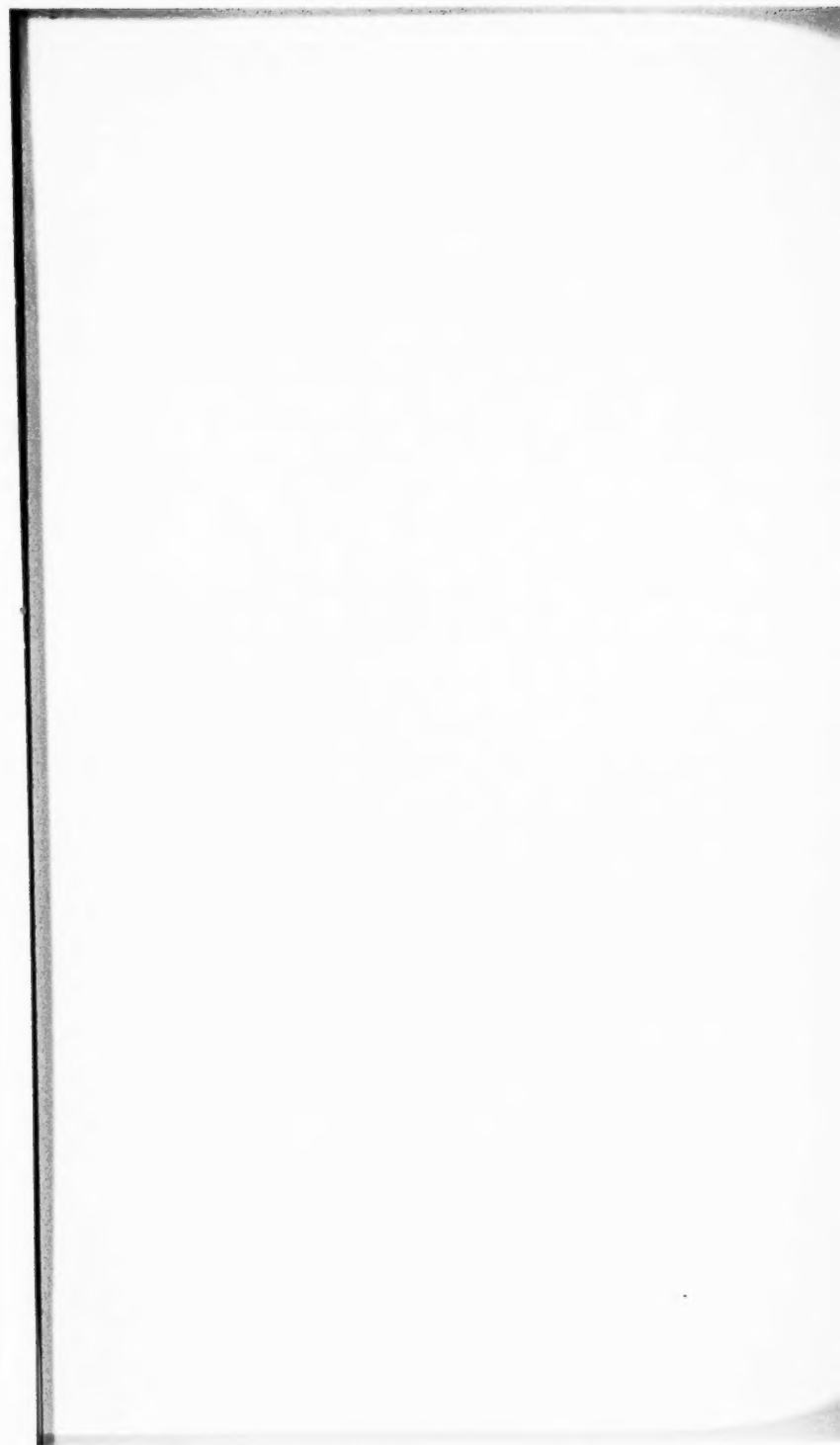
wireless company's service, and to the extent it could make commercial use of the messages received, would so use them, would a court of equity even if no patents were involved, or public franchise, sit helplessly by and see that whole triumph of modern achievement destroyed or sorely wounded for lack of a precedent? Would the court be confused, even for a moment, with the plea that such a release into the air, itself open alike to all, of what the service carried, was a dedication to the public, or an abandonment, of the product of the company's service?

The gathering of the news of the world as the Associated Press gathers and distributes it is itself a triumph in modern newspaper achievement. Like the telegraph it brings the corners of the earth together. It not only fulfills an instinct in the human breast to know how the rest of the world fares, but is one of the agencies that assists human effort in its mission of helpfulness to others. In its exact details the case we bring here may be without exact precedent. But it has its precedent, in every case in which a court, confronted with a more or less new question, has turned to fundamental principles of right and wrong as a guide-board of what should be done with the particular case presented.

"I believe most thoroughly that the powers of a court of equity are as vast, and its processes and procedure as elastic, as all the changing emergencies of increasing complex business relations and the

protection of right can demand" (Justice Brewer, quoted in Joyce on Injunctions, Vol. 1, paragraph 2, note 22). "It is the great merit of the common law" says Chief Justice Shaw, quoted in the address of Judge Colt before the American Bar Association in 1903 "that it is founded upon a comparatively few broad general principles of justice, fitness and expediency * * * and generally comprehensive enough to adapt themselves to new institutions and conditions of society, new modes of commerce, new usages and practices as the progress of society in the advancement of civilization may require."

PETER S. GROSSCUP,
of Counsel.



APR 20 1918

JAMES D. MAHER;
CLERK.

Supreme Court of the United States.

OCTOBER TERM 1917. No.

68 221

INTERNATIONAL NEWS SERVICE,

Petitioner-Defendant below,
against

THE ASSOCIATED PRESS,

Respondent-Complainant below.

On writ of certiorari to the United States Circuit Court
of Appeals for the Second Circuit.

BRIEF FOR RESPONDENT.

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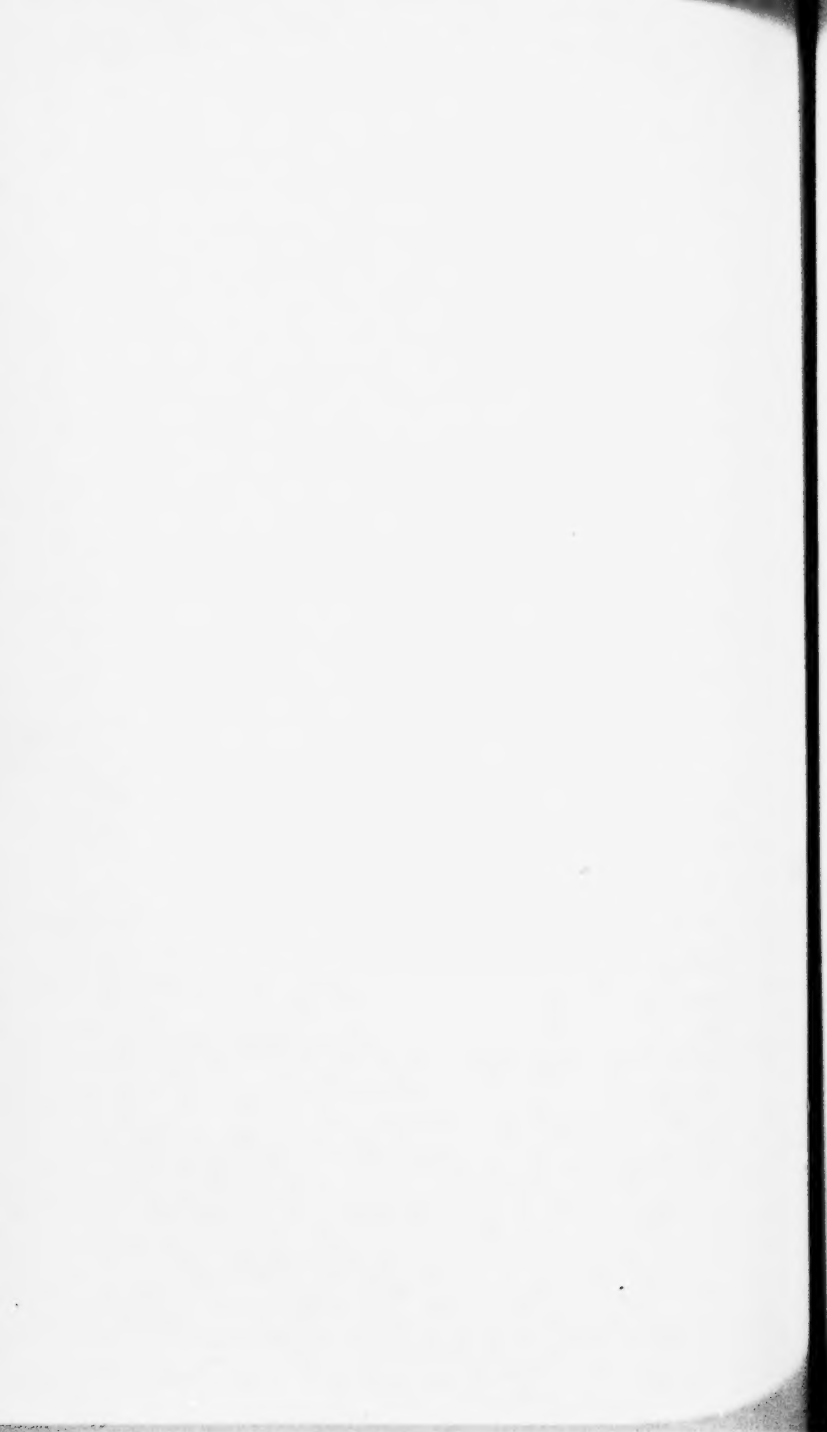


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Supreme Court of the United States,

OCTOBER TERM, 1917.

No. 568.

INTERNATIONAL NEWS SERVICE,
Petitioner-Defendant below,

AGAINST

THE ASSOCIATED PRESS,
Respondent-Complainant below.

**BRIEF FOR RESPONDENT-COMPLAINANT
BELOW.**

Statement.

This cause comes here on a writ of *certiorari* to review the decision of the United States Circuit Court of Appeals for the Second Circuit, modifying and affirming as modified the order of the District Court granting the complainant's motion for a preliminary injunction *pendente lite* (Record, p. 203).

The suit was instituted to restrain the defendant from appropriating the news gathered at great cost by the complainant for the use of its members, and selling and transmitting the same to the customers of the defendant. The defendant, as the District Court finds, has thus appropriated the complainant's news by three methods :

FIRST. By bribing an employee of one of complainant's members to furnish such news as soon as received from the

complainant, before publication by such member (Finding 4, p. 5).

SECOND. By obtaining such news from the editorial room of the *New York American*, published by one of complainant's members, before publication by such member, and thus inducing such member to violate the confidence upon which it received the complainant's news (Finding 5, p. 6).

THIRD. By taking complainant's news reports from the early editions of newspapers published by its members, or from their bulletin boards, either transcribing such reports bodily or rewriting them, without original investigation and without expense (Finding 6, p. 6).

The District Court also finds that in the particular aforesaid defendant has acted unfairly in competition with the complainant (Finding 9, p. 6), and that by these methods the defendant has greatly injured and is injuring the complainant and its members and depriving them of the just benefits of their labors and expenditures, and causing them irreparable damage (Finding 10, p. 6).

The District Court granted the motion for an injunction as to the first two methods, but denied the motion as to the third, for the reason, as specifically stated in the order (p. 7), that, although the Court was satisfied, both on the facts and the law, that the practice in question was unlawful and inequitable, and that complainant was entitled to the injunction, the legal question was one of first impression and should be decided by the Circuit Court of Appeals before an injunction should be granted; and the Court further provided in the order that its denial of the preliminary injunction against the third practice should be conditioned upon the co-operation of the defendant to advance the hearing of an appeal to the Circuit Court of Appeals, and to obtain a speedy disposition of such appeal (p. 7).

The complainant accordingly appealed from so much of the order below as denied the injunction in respect to the third practice, and the defendant appealed from so much of the order as granted the injunction in respect to the first two practices.

The Circuit Court of Appeals decided that the injunction should have been granted against the third practice as well as the other two, both as an infringement upon complainant's property right and also as unfair competition, and decreed that the order of the District Court be modified accordingly (pp. 201, 203).

The facts upon which the application for the preliminary injunction was based, as alleged in the bill of complaint and supported by the affidavits and found by the District Court, are briefly as follows :

The Complainant and Its Business and the Competition to Which it is Subject.

The complainant is a co-operative association, organized in 1900 under the Membership Corporations Law of the State of New York, for the purpose of gathering from sources all over the world, by its own instrumentalities, by exchange with its members, and by other appropriate means, any and all kinds of information, news and intelligence, telegraphic or otherwise, for the use and benefit of its members, and distributing the same among its members for publication in the newspapers owned or represented by them. The complainant gathers its news by the following methods. It has its own representatives in every important capital and city in the world. It has reciprocal arrangements with important news agencies abroad for the interchange of news. It has about nine hundred and fifty members, each owning or representing a daily newspaper in the United States. Each of these members, as required by the charter and the by-laws, gathers the local news of his district and supplies it to the complainant, and is not allowed to supply that news to any one else (p. 173). All news collected by the complainant is promptly transmitted by wire or telephone or other appropriate means to its members for publication in their newspapers.

In return for this service in all its branches, each member contributes his *pro rata* share of the complainant's direct expenditure (which is very great, amounting in the year 1915 to about \$3,500,000) and also the service of his own news-

paper in collecting the local news of his own district for the exclusive use of complainant's members (p. 18).

The complainant has no stock, pays no dividends and makes no profits.

The service of the complainant is of great financial and business importance to its members for the reason that no modern newspaper can be successfully conducted without such world-wide service of news, and that no member alone could provide the machinery or afford the cost of obtaining such news independently. It must obtain it, if at all, through some such co-operative organization as this, or else by purchase from one of the profit making news agencies, of which there are several such as the defendant and the United Press. If such a co-operative organization is efficiently administered, and protected in its rights, obviously its service to its members must be cheaper than that of any profit making news agency, because it makes no profit and because of its large membership, which not only divide the burden but also supply it without substantial cost with their own local news. It is important therefore that the complainant shall have as large a membership as possible, for it thus obtains the news gathered by such members, and, as the cost is divided amongst all the members, the larger the membership the less will be the individual cost.

Competition exists between the complainant and other news agencies and also between newspapers published by members of the complainant and rival newspapers purchasing service from other news agencies. The value of the complainant to its members necessarily depends upon the adequacy, reliability, promptness, cheapness and *exclusiveness* of its service. Any practice which diminishes its value to its members and induces withdrawals seriously injures the complainant and its remaining members. It is accordingly of vital importance to the complainant and its members that the news which it gathers for their benefit and at their expense, and transmits to them, shall be kept for their exclusive use, and shall not be appropriated by other news agencies or become available for competing newspapers which do not share in the cost thereof. This is true as to the news which a member gathers locally on behalf of the complainant and

supplies to it for the use of other members, as well as to the news which a member receives from the complainant. In other words,—owing to the co-operative nature of complainant's business system, and the requirements of the charter and by-laws, all local news gathered by a member for the Associated Press is really gathered by an agent of the complainant just as truly as the news gathered by other agents employed by the complainant and belongs just as exclusively to it and its members. The by-laws of the complainant accordingly provide that the local news which the members thus gather for the complainant, for the use of other members, and the news which the complainant obtains from them and from its other agents and transmits to its members shall be received and used exclusively for the purpose of publication in their own newspapers, and that no member shall permit any other use to be made of such news, or furnish, or permit anyone in its employ or connected with his newspaper, to furnish any such news to any one who is not a member (pp. 19, 173).

The Defendant and Its Business.

The defendant is a profit making news agency organized under the laws of the State of New Jersey, and is engaged in the business of collecting news and selling it to newspapers throughout the United States. It is in competition with the complainant, and many of the newspapers which take its service are in competition with the newspapers published by the complainant's members.

Complainant's Charges Against Defendant.

From time to time complaint had been made by the complainant's members that publishers of newspapers, not members of the Associated Press, but taking the defendant's service, were publishing in their newspapers the news gathered by the complainant, and that such non-members were obtaining such news at less cost than the proportion of the cost of gathering and distributing the same by the complainant, which its members in the same locality were required to pay. After careful investigation the complainant found that the defendant in many cases was appropriating

and pirating the complainant's news by various unlawful methods (p. 20). The defendant thus obtained at little or no cost news which the complainant had gathered at enormous cost, and sold it to its clients as its own, and as if it had been collected by defendant independently from its own original sources of information. The defendant having thus escaped the great cost of collecting the news from original sources, which the complainant was required to pay, was able to sell such news to the newspapers at less than its cost to complainant's members.

Defendant's Methods of Taking Complainant's News.

The defendant thus appropriated the complainant's news by the three methods, before mentioned, as follows :

FIRST. The defendant bribed employees of the *Cleveland News*, a newspaper published by one of the complainant's members, to furnish the complainant's news, as soon as received, to the defendant's nearest office to be at once transmitted over its own wires and by telephone and otherwise to its clients. The fact that this system of piracy was carried on is clearly shown by the letter from Barry Faris, the day manager of the International News Service in the City of New York, to F. H. Ward, manager of the Cleveland office of the International News Service, dated November 21, 1916, quoted in Mr. Stone's affidavit (p. 21), and also by the affidavit of F. W. Agnew, telegraph operator or bureau manager of the International News Service at Cleveland (p. 28), and the affidavit of Cooper (p. 67). It thus appears that during the entire time that Agnew was connected with the International News Service, from January 17, 1914, to the time when this suit was instituted, the International News Service had a secret arrangement with B. E. Cushing, the telegraph editor, and during a part of that time also with T. J. Thomas, the assistant telegraph editor of the *Cleveland News*, by which for a consideration regularly paid they delivered to the representative of the defendant at Cleveland information contained in

important dispatches from the Associated Press, immediately upon their receipt by the *Cleveland News*, and also the local news gathered by the *Cleveland News* for the complainant, and that thereupon the manager of the International News Service transmitted the same at once by wire to the clients and customers of the defendant. This is also admitted by the affidavits of Cushing and Thomas, and is corroborated by the affidavits of Ollie Jospy and Edna Murfey, telephone operators in the employ of the *Cleveland News* (pp. 44, 46, 47, 48).

The District Court so found (Order, finding 4, p. 5; Opinion, p. 177), and the Circuit Court of Appeals concurred (Opinion, p. 195).

SECOND. The defendant also obtained the news of the complainant from the editorial rooms of the *New York American*, published by one of complainant's members, which is controlled by William R. Hearst, who also controls the defendant, and which occupies the same building in New York with the defendant. The defendant thus induced the complainant's member to violate his pledge to the complainant and the confidence upon which he received the news reports of the complainant and thus was able to examine and copy the news reports of the complainant as soon as they were received by the *New York American*. This is clearly shown by the affidavits of Eke, Koukol, Finnerty, Wishart and Sullivan (pp. 40, 41, 43, 57, 58). From these it appears that the deponents were employees of The Associated Press, engaged in inspecting or repairing or attending to the Morkrum receiving machine, which was maintained by The Associated Press in the editorial room of the *New York American*, and over which the news reports of The Associated Press were received by the *New York American*, and repeatedly observed the editors or other employees of the defendant enter such editorial room and copy or make extracts from such news reports as they were received over said machine, and delivered to the editors of the *New York American*.

And the District Court so found (Order, Finding 5, p. 6; Opinion, p. 180), and the Circuit Court of Appeals concurred (Opinion, p. 195).

THIRD. Defendant systematically and continuously copied the despatches of the complainant from early editions of the newspapers published by complainant's members, and also from bulletin boards maintained by them in front of their newspaper offices, and regularly transmitted the same either bodily or after rewriting to its members over its own wires, as if gathered by it independently from original sources. This is clearly shown by the affidavit of William E. Hall (p. 49), and by Mr. Stone's affidavit at page 24, which gives ten typical instances in which The Associated Press foreign news reports were published in papers taking the defendant's service, and accredited to it as if they had been received by the defendant's own cables from abroad, after it had been cut off from using any of the cable lines by prohibition of the various foreign governments.

The District Court so found (Finding 6, p. 6), and the Circuit Court of Appeals has concurred (Opinion, p. 196), and the practice is admitted by defendant's answer (pp. 100-1),

The pirating of the complainant's news by these methods had been more flagrant and injurious to the complainant during the previous months, on account of the great importance of the news connected with the war, both from the field of battle and also from the field of diplomacy, and especially because, as appears from Mr. Stone's affidavit (at p. 24), and is admitted by the defendant, the defendant was prohibited from securing any news, and from using any of the cable lines for its transmission, by the British Government on October 10, by the French Government on November 8, by the Canadian Government on November 11, and by Portugal and Japan on November 17, 1916. After those dates it was not possible for the defendant to obtain or receive news by telegraph or cable from any of the countries indicated, and yet it regularly sent out, day by day, during this period, news to its clients as if re-

ceived by it from these countries by cables connecting them with the United States, and such news was regularly published in newspapers taking the defendant's service and accredited to it.

The defendant thus obtained for little or nothing and appropriated and sold to its customers as its own the news which the complainant had gathered at enormous cost.

Under these circumstances the complainant was being seriously injured and, as every day brought world news of vast importance and incalculable commercial value, the need for immediate relief was imperative and the injunction was applied for and obtained.

Assignments of Error in the Circuit Court of Appeals.

On the Appeal.

The *complainant's* sole assignment of error was the denial of an injunction against the defendant's practice of copying and selling complainant's news obtained from its members' newspapers and bulletin boards. In respect to this practice, as before stated, the District Court announced its conclusion in favor of complainant on all points, both of fact and law, and the complainant's claim was that the Court erred in not granting the relief called for by its findings.

On the Cross-Appeal.

The *defendant* appealed from that part of the order which grants an injunction and from each of the findings of fact and law.

The facts found by the District Court and approved by the Circuit Court of Appeals are fully sustained by the affidavits.

In regard to obtaining news by surreptitious methods, the defendant admits the law but disputes the facts, although its deponents have admitted enough upon the facts to justify the injunction as stated in the opinion of the District Court.

In regard to the practice of copying news from newspapers and bulletin boards, the defendant admits the facts but in its

brief and argument disputes the law, and seeks to justify the practice as fair and lawful.

It should be noted, however, that in its answer (p. 103) it in effect admits the illegality of this practice. In setting up as a separate defence the charge of unclean hands, the defendant makes the same charges against the complainant as those contained in the bill of complaint, and in substantially the same words. It alleges in Article 17 (p. 104) that the complainant has by these methods, describing them, including the taking of defendant's news from first editions and bulletin boards of newspapers, "unlawfully appropriated" such news, and describes the practices as "pirating," "obtaining unlawfully" and "unlawfully appropriated."

Thus the defendant largely relies upon a charge that the complainant has itself been guilty of the same practices, and should therefore be barred from relief. The District Court found that the complainant has not been guilty of any of the practices complained of, and this finding was approved by the Circuit Court of Appeals, and is fully supported by the Record (Finding 7, p. 6, p. 195).

The only real issue in the case is the question of law as to whether the defendant can *lawfully* appropriate without cost and sell the news, gathered by the complainant at great cost for the use of its members, when it first appears in any newspaper or on a bulletin board of one of such members. In respect to this practice, the District Court announced its conclusion in favor of the complainant's right to an injunction on all points, both of fact and law, but still denied the injunction pending the determination of the law by the Circuit Court of Appeals.

The Circuit Court of Appeals affirmed the order below in so far as it granted an injunction against the first two practices referred to, and in an opinion by Judge HOUGH (p. 201) decided, Judge WARD dissenting, that an injunction should also have been granted against the third practice, both as an infringement upon complainant's property right and also as unfair competition, and decreed accordingly.

Thus, both the District Court and the Circuit Court of Appeals, after mature examination and in unusually complete, well considered and carefully prepared opinions, have held that the complainant is entitled to full protection against all

three practices of the defendant. The decision thus reached is fully supported by reason and authority.

Since the petitioner, upon this *certiorari*, does not raise any question as to the propriety of the injunction against the first two practices referred to, we shall confine our argument to the injunction against the third practice.

POINT I.

News as a business commodity is property. Among the many forms of value which constitute property, news is one of the more recent, but its status as property has been thoroughly established.

It is property because it costs money and labor to produce and because it has value for which those who have it not are ready to pay.

This value is peculiarly commercial. The information which it contains may be the basis of profitable operation; but the news itself, except for sale to those who do not know of the event it covers, is valueless. Nobody wants it to keep and use for any other purpose. It has no form that is desirable nor any tangible qualities. Its value does not even lie in the particular phraseology by which it is passed from one to another, any more than it depends upon the kind of paper by which it is carried if written, or the quality of voice by which it is carried if spoken. Its sole elements of value are its novelty, its accuracy and its presence in the place where there are people interested enough to pay for knowing it, and at the time when they are so interested.

If the conditions of the world were such that every happening anywhere became automatically known to everybody everywhere, there could hardly be any property value in news; but, as the world actually is, a great organization of vigilance, investigation, transmission and distribution is necessary to connect the fact with those who wish to know it.

This organization, composed of capital and labor, is what *creates* the business commodity of news. The raw material is the event and the final product is the message by which the event is brought to the purchaser ; and whoever creates this product is entitled to it as his property on fundamental principles of property right.

The complainant has established and operates an organization of labor and capital covering the whole world, costing three and one-half million dollars a year, aside from the unappraised cost of the work done by its members on its behalf ; and the product of all this effort and expense is its property, because it made it.

This is not to say that an organization which first discovers the happening of an event and transforms that discovery into a thing of commercial value, has an exclusive right or monopoly to all announcement of that happening.

It is only that such an organization has the exclusive right to the property which it has itself created—*i. e., its own message* from the happening to those who seek to buy.

Any other organization has the same right to whatever message it may itself similarly create, even though it be a later message, but it can have no right to appropriate the message which another has secured and created by his exclusive effort and expense.

As stated by Mr. Justice HOLMES in *Bleistein v. Donaldson*, 188 U. S., 249, in reference to a lithograph copy of a painting from life, " Others are free to copy the original. They are not free to copy the copy."

This principle that there is a property right in news, as a business commodity, has been established by conclusive legal authority, and indeed is not disputed in this case, as the defendant limits its contention to the proposition that the property right expires with first announcement of the news either in an early newspaper or an early bulletin, a proposition which we discuss in the next point.

As, however, this principle is fundamental in this case, we invite the attention of the Court to certain of the cases which establish it and to the reasoning on which they proceed.

That there is a property right in news is settled in this Court by its decisions in *Hunt v. Cotton Exchange*, 205 U. S.,

322, 333, and *Board of Trade v. Christie Co.*, 198 U. S., 236, 250, in which injunction was held proper to protect the property rights of the New York Cotton Exchange, and of the Chicago Board of Trade, respectively, in their collections of quotations. In the former case the court said : Mr. Justice McKenna, " It will be observed that this case is like the *Board of Trade of the City of Chicago v. Christie Grain & Stock Co.*, 198 U. S., 236, and we therefore start with some propositions established. It is established that the quotations are property and are entitled to the protection of the law, and that the Exchange ' has the right to keep the work which it has done, or paid for doing, to itself. ' " The question in the *Christie* case whether the property rights had been lost by publication will be discussed under the next point, but the case is direct authority for the proposition that news, as a business commodity, is a species of property, and upon this fundamental point the Court said (p. 250) :

" In the first place, apart from special objections, the plaintiff's collection of quotations is entitled to the protection of the law. It stands like a trade secret. The plaintiff has the right to keep the work which it has done, or paid for doing, to itself. The fact that others might do similar work, if they might, does not authorize them to steal the plaintiff's. Compare *Bleistein v. Donaldson Lithographing Co.*, 188 U. S., 239, 249, 250."

In that case this Court reversed the decision of the Circuit Court of Appeals for the Eighth Circuit in *Board of Trade v. Christie Co.*, 125 Fed., 161,* and affirmed that of the Circuit Court of Appeals for the Seventh Circuit in *Board of Trade v. Kinsey Co.*, 130 Fed., 507, 513. The *Kinsey* case held directly that there is a property right in news in the form of price quotations which is entitled to protection by injunction against appropriation. The opinion was explicit in recognizing the property character of news as follows :

" 2. The real subject matter of the suit is the property rights in the news, in the reports of prices. * * *

* Which, however, did not deny that news is property, but merely held that the particular news was so tainted with illegality that it was not entitled to protection.

News may be an object of lawful ownership, though nine-tenths of the things reported be unlawful.

" 3. Nor should the property in this case (the news, the continuous quotation of prices) be adjudged contraband because it is susceptible of bad uses as well as good. * * *

" 4. The property concerned in this suit not being contraband, should appellant be denied the writ of injunction, even if it were true that appellant permits gambling in its exchange hall? We think not. Suppose this non-contraband news were collected and disseminated by The Associated Press. If that Company were complainant and 'clean-handed', its right to an injunction, the case being proper in other respects, would not be doubted."

The same principle was applied on the authority of the *Christie* case in the Circuit Court of Appeals for the Second Circuit, in *Board of Trade v. Tucker*, 221 Fed., 305, where the court held that a property right exists in news ticker stock quotations, and then proceeded to hold further, as discussed in the next point, that this property right was not lost by a blackboard publication.

The leading case on the subject is the decision of the Circuit Court of Appeals for the Seventh Circuit in *National Telegraph News Co. v. Western Union Tel. Co.*, 119 Fed., 294, which was cited with approval by this Court in the *Christie* case, *supra*.

That was a bill for injunction to restrain the National Company from copying news off tickers operated by the Western Union. The chief question was whether there was a property right in such news which could be protected by injunction, and the Court held there was, with an opinion in the course of which they said :

" It is obvious, at a single glance, that the appellee is at great expense in gathering and transmitting the news, and in maintaining the instrumentalities, the offices, and the wires, through which its work, in this respect, is accomplished. At every initial point there must be one who is on the lookout—eyes trained to see, and a judgment trained to discriminate—and in every central office there must be minds fitted by native wit and acquired knowledge to winnow the wheat from the chaff. Added to this is the increased cost of dispatches, instruments, wires and plant made necessary by this special department of appellee's business. * * *

" Indeed, the printed tape under consideration has no value at all as a book or article. It lasts literally for an hour, and is in the waste basket when the hour is passed. It is not desired by the patron for the intrinsic value of the happening recorded—the happening, as a happening, may have no value. The value of the tape to the patron is almost wholly in the fact that the knowledge thus communicated is earlier, in point of time, than knowledge communicated through other means, or to persons other than those having a like service. In just this quality—to coin a word—the *pre-communicatedness* of the information—is the essence of appellee's service; the quality that wins from the patron his patronage.

" Now, in virtue of this quality, and of this quality alone, the printed tape has acquired a commercial value. It is, when thus looked at, a distinct commercial product, as much so as any other output relating to business, and brought about the joint agency of capital and business ability. In no accurate view can appellee be said to be a publisher or author. Its place, in the classification of the law, is that of a carrier of news; the contents of the tape being an implement only, in the hands of such carrier, in its engagement for quick transmission. This is Service; not Authorship, nor the work of the Publisher. * * *

" The business involves, also, the use of property. This consideration brings it at once, in a general way, within the protecting care of courts of equity. At first glance the immediate act restrained in the order below—the use of the information by a rival enterprise until after sixty minutes—may not appear as a trespass upon, or injury to, property, other than to the extent that there may be property in the printed matter. But such a view falls short of looking far enough. Property even as distinguished from property in intellectual production, is not, in its modern sense, confined to that which may be touched by the hand, or seen by the eye. What is called tangible property has come to be, in most great enterprises, but the embodiment, physically, of an underlying life—a life that, in its contribution to success, is immeasurably more effective than the mere physical embodiment. Such, for example, are properties built up on franchises, on grants of government, on good will, or on trade names, and the like. It is needless to say, that to every ingredient of property thus made up—the intangible as well as the tangible, that which is discernible to mind only, as well as that susceptible to physical touch—equity extends appro-

prate protection. Otherwise courts of equity would be unequal to their supposed great purposes ; and every day as business life grows more complicated, such inadequacy would be increasingly felt."

Other authorities are

Board of Trade v. McDearmott Co., 143 Fed., 188 (C. C. W. D. Missouri).

Board of Trade v. Hadden-Krull Co., 109 Fed., 705 (C. C. E. D., Wisconsin),

and they were cited with approval by the Circuit Court of Appeals for the Sixth Circuit (Judge LURTON) in *John D. Park & Sons Co. v. Hartman*, 153 Fed., 24, 31, where Judge LURTON assimilated the property right in news to that in trade marks, and in the cases involving trading stamps and railroad ticket scalpers.

In *Board of Trade v. Cella Commission Co.*, 145 Fed., 28, the Circuit Court of Appeals for the Eighth Circuit, whose decision in the *Christie* case had been reversed by the Supreme Court as above stated, directly held that these rights in news were "property" (p. 31).

In *F. W. Dodge Co. v. Construction Information Co.*, 183 Mass., 66 ; N. E., 264, the Supreme Court of Massachusetts granted an injunction to protect the Dodge Company against appropriation of information relative to the erection of buildings collected by it for sale to subscribers. The Court treated the right as a part of the property in news and upheld it as follows :

"The important question in this case may be divided into two parts : First. Has the plaintiff any property in the information after it has been obtained at great expense and compiled for the use of its subscribers ? Second. Does it lose its property by publication, abandonment, or dedication to the public, when it furnishes the information to subscribers under these contracts ? The facts, before it has ascertained them, unless they are held for a special purpose confidentially and as secrets, are not property ; but when these facts have been discovered promptly by effort and at expense and have been compiled and put in form, and are of commercial value by reason of the speedy use that can be made of them before they have obtained general publicity, they are property. They represent expensive effort and valuable service, and, in the form in which they are presented to subscribers, they may be

used with a reasonable expectation of profit from the early possession of them. The information is not visible, tangible property, but there is a valuable right of property in it, which the courts ought to protect in every reasonable way against those seeking to obtain it from the owner without right, to his damage. What the plaintiff has when the defendant seeks to obtain it from him is the possession of valuable information. This early possession is valuable in itself. The plaintiff has it and the defendant does not have it. If the defendant can obtain it legitimately, he becomes the owner of the same kind of property, and the two may become competitors in the market as vendors to those who are willing to pay for it. But if the defendant surreptitiously and against the plaintiff's will takes from the plaintiff and appropriates the form of expression which is the symbol of the plaintiff's possession, and thus, by direct attack, as it were, divides the plaintiff's possession, and shares it, this conduct is a violation of the plaintiff's right of property. That there is a right of property of this kind has been decided in England in regard to information of stock quotations and other different kinds of news obtained to be furnished to those who will pay for it. *Exchange Telegraph Co. v. Gregory*, 1 Q. B. (1896), 147; *Exchange Telegraph Co., Ltd., v. Central News Co., Ltd.*, 2 Ch. (1897), 48. This has also been held by different courts in this country. *Kiernan v. Manhattan Quotation Telegraph Co.*, 50 How. Pr., 194; *Chicago v. Christie Grain and Stock Co.*, 116 Fed. Rep., 944; *Nat. Telegraph News Co. v. Western Union Telegraph Co.*, C. C. A. 7th Circuit, Oct. T., 1901. We are of opinion that one's possession of information which he has obtained, compiled and put in form for a specific use, is a right which ought to be protected against those who would share it with him without his consent."

Apparently the earliest case in this country was the one decided by Judge VAN BRUNT in 1876, *Kiernan v. Manhattan Quotation Tel. Co.*, 50 How. Pr., 194, 196, 198, in which it was held that news was property and entitled to protection by injunction. Judge VAN BRUNT's analysis of the principles upon which this property right stands is especially pertinent :

"It is claimed by the defendants that no such right of property exists in news, upon the ground that before this intelligence was gathered together by the agents of the Associated Press in Europe, it was public property

and open to all the world, and that it was not made the exclusive property of the Associated Press because it had been collected and telegraphed to them by its agents. That before it was gathered the first comer had a perfect right to have his news and publish it.

"It may be perfectly true that no person could be restrained from the publication of this news in Europe, but it is difficult to see how such a right can be extended so far as to authorize the publication of news which has been collected by the agents of the Associated Press, and telegraphed to them at great expense without its consent.

"It would be an atrocious doctrine to hold that dispatches, the result of the diligence and expenditure of one man, could with impunity be pilfered and published by another.

"It is undoubtedly true that in respect to news, its publication cannot be interfered with where the party procures the intelligence by the diligence of its own agents; but if he seeks to profit by the superior diligence of his rivals, it is unjust that he should be allowed to do so until the right of property has been abandoned by publication.

"The mere fact that a certain class of information is open to all that seek it, is no answer to a claim to a right of property in such information made by a person who, at his own expense and by his own labor, has collected it. * * *

"These cases clearly sustain the doctrine that a man may impress upon materials, which are open to all the world, a right of property when he has, as the result of his own efforts and expenditure, collected and reduced to a form serviceable to the public such material.

"This right of property, however, does not preclude another person, as the result of his own efforts and diligence, from collecting independently, and utilizing as he may see fit, the same materials.

"Applying this principle to the case of the Associated Press, it is clear that it has a right of property in all news transmitted to it by its agents, until it abandons that right by publication. The agents of the Associated Press abroad, it is true, only do that which any other person could do if they felt so disposed; but the collection of news being the result of their own labor, and its value as news being impressed upon it by the fact of such collection, and by the fact of its being telegraphed by cable at great expense, clearly bring such dispatches within the principles of the cases cited."

The common law property right in news established by these cases in this country has also been recognized in England in

Exchange Telegraph Co. v. Howard, 22 Law Times Rep., 375.

Same v. Gregory (1896), 1 Q. B. D., 147.

Same v. Central News (1897), 2 Chancery, 848,

Cox v. Land & Water Journal Co., L. R., 9 Eq., 324; 21 L. T. U. S., 548.

In the last of these cases plaintiff sought to enjoin defendant from copying lists of hounds gathered and published by plaintiff in the *Field* newspaper. MALINS, V. C., uses the following language, especially applicable to the case at bar.

“For the purpose of the argument it must be assumed that the article complained of was a copy of the article of the plaintiff, and upon that ground the defendant takes the objection that there can be no copyright in any article published in this newspaper, because it is not registered under the Act 5 & 6 Vict., c. 45, commonly called the Copyright Act. * * *

“If the contention of the defendant is right, the paper which copies might say: ‘But they are common property. True it is, I admit, that you have paid for them. I admit you have given a great deal of money for them, and they are so very valuable that I desire to turn them to account by publishing them in my newspaper; but you have no property in them, although you pay for them; you cannot sue for your newspaper as a book, for then the copyright must be registered, and as you have not registered the book nothing in the newspaper is protected.’ *If that is the law, it is a monstrous state of law*, repugnant to common sense and common honesty, because that there is a property in those articles there can be no shadow of doubt. * * *

“I must infer that it was not the intention of the Legislature to apply the Act to newspapers (for it was absolutely impossible that it should have missed insertion in some of the sections), and that the circumstance of non-registration throws no difficulty in the way of the plaintiff maintaining his right in law or equity; and though it is seldom worth the while of proprietors to assert the copyright in articles in a newspaper, I am of opinion that, whether it be the letters of a correspondent abroad, or the publication of a tale, or a treatise, or the review of a book, or whatever else, he acquires—I will not say as copyright, but as property—such a property exists in

every article for which he pays, under the 18th section of the Act, or by the general rules of property, as will entitle him, if he thinks it worth while, to prohibit any other person from publishing the same thing in any other newspaper, or in any other form. * * *

"It is clear that in this case the getting the names of masters of hunts, the numbers of hounds, the huntsmen, and whips, and so forth, is information open to all those who seek to obtain it, but it is information they *must get at their own expense, as the result of their own labour, and they are not to be entitled to the results of the labours undergone by others.*"

Upon this point the Circuit Court of Appeals in its opinion in this case says (Record, p. 197) :

"There is no doubt either on reason or authority that there is a property right in news capable of and entitled to legal protection * * *. Special or trade news of divers kinds constitute property, as has often been decided [citing above cases]. * * * There is no distinction entailing a legal difference between news of the prices of corporate securities or commodities, of sporting events or opportunity of profitable contracting, and news of current political, social or national events. Both require labor and expense in acquisition and transmission and dissemination. Both have exchangeable values and all alike lose by exposure the quality of news which, when it becomes history, may remain important, but its commercial value has largely gone."

SECOND POINT.

This property right does not expire with the mere first appearance of the news either in a single paper or on a bulletin board, but continues and is entitled to protection so long as the news has property value.

Defendant has conceded, as it must under the law established by the cases cited above, that news is property and entitled to protection as such, but, notwithstanding the implied

admission in the separate defence in its answer that taking such news from early editions is unlawful (p. 103), before noted, argues that the property right disappears, and with it the right to protection, the instant the news has its first publication, either in a single copy of an early edition of a newspaper sold, to an individual for two cents, or on a bulletin board, and that the defendant may thus obtain the complainant's news and may lawfully sell it even in competition with the complainant.

We believe that this proposition will not bear analysis and cannot be sustained.

FIRST: To hold that complainant has a property right in the news collected by it and yet is entitled to only one exclusive publication by one of its members of a news item discovered, investigated, prepared, transmitted and distributed by it, would be to destroy the property the instant its value is commercially available, and set up an artificial doctrine of law under which the business of news collection and distribution cannot live.

As a practical proposition, it requires no argument to show that the vast organization necessary to gather and bring news items, accurately and swiftly, from every part of the globe to New York and transmit them to the newspapers cannot possibly be maintained if its exclusive commercial utilization is instantly cut off the moment that such news is published in one single copy of a newspaper or upon a bulletin board. No expenditure of \$3,500,000 a year can be made for a business return of the nothing which comes in from posting the news on such bulletin board or the cent or two that comes from the sale of the first paper.

Yet that is precisely the claim of the defendant here; and conversely it claims that as soon as we have received that much fruit of our expenditure and work, it is entitled, without any expense, to take and sell our product even for commercial purposes to the same extent that we can and in competition with us.

Let us illustrate the practical effect of this proposition by a single condition of this business. The Associated Press is a co-operative association composed of the representatives of over 900 newspapers scattered over the United States, which

are compelled to co-operate in the collection of news, both foreign and domestic, for the obvious reason that no one of them, by itself alone, could support the necessary world-wide organization. Each of these papers contributes as its share of the co-operation, (1) its *pro rata* portion of the cost of collecting and distributing the foreign news, and general news in the United States, and (2) its own work in collecting local news of its own vicinage.

As its sole return for these contributions of money and work, each member receives the news collected by the co-operative efforts of the whole association.

The first commercial utterance of this news product, so collected at the expense and by the efforts of all, is necessarily in the papers of the eastern border, because they come out earlier, owing to the difference in time. The issues in San Francisco, for instance, appear three hours later than the corresponding issues in New York.

If the defendant's position is correct, the San Francisco papers can gain nothing whatever, except the satisfaction of fair and honorable dealing, in return for their contributions of money and labor to The Associated Press; because the news, which they have assisted in producing and pay for, can be freely taken by the defendant in New York and telegraphed to San Francisco and sold there for publication by non-contributing papers as early as by themselves and at less than they have to pay. And the same thing is true as to papers published in many cities between San Francisco and New York.

A similar situation exists even within the eastern cities themselves. The morning papers are printed and put out at about midnight. If the defendant's position is sound, the defendant can take the news at this time from a first edition published by one of the complainant's members and deliver it to its customers who can print it and have it out on the streets before 5 A. M., long before the time of its really substantial sale value has arrived, which is the breakfast table. The defendant and its customers with little or no cost can thereby stand on much better selling terms than those who have paid for and produced the news.

The defendant's proposition carried to its necessary conclusion goes even further. If it is to be established, anyone can print an exact duplicate of any morning paper, like the

New York Times for example, and advertise it as such and sell it for one-half the price of the original. While this wholesale piracy would no doubt so shock the moral sense of the community that it may be doubted whether such a counterfeit would have a very large circulation, it would doubtless be profitable because it would escape the great cost of gathering, arranging and editing the news, and no organization or staff would be required except for printing and selling the newspaper and its advertisements.

These illustrations might be multiplied but they suffice to show that the defendant's claims involve a preposterous distortion of the real business facts of this industry, and imply a maladjustment between rules of law and equity on the one hand, and industrial and public necessities and fundamental principles of right and wrong on the other, which it is impossible to conceive that the courts will create.

This leads to a consideration of the question whether any fixed rules of law or equity support or require such a result.

SECOND. By the very inherent nature of this property right it continues to exist, as a matter of law, and to be entitled to protection until the full commercial value of the news has been realized.

The cases collected in the First Point of this brief base the very recognition of the right in news as a property right upon its value as a commercial product, resulting from the use of capital and labor, and possessing value capable of being realized only by sale and purchase.

Defendant's proposition accepts the shell of this principle and denies the kernel, for they say, first, that news is property owing to its cost and commercial value, and then, second, that it ceases to be property, *ipso facto*, the moment the first cent of its great cost is reimbursed or the first cent of its commercial value realized.

The property right is the right to the "*precommunicatedness*" of the news, to adopt the word coined by the Circuit Court of Appeals for the Seventh Circuit in the *National Telegraph case*, 119 Fed., 295, and the courts have recognized this by adjusting the time of the protection in such a way as to

make it effective for the particular circumstances. In the *Christie* case, 198 U. S., 251, this Court said that "Time is of the essence in matters like this," and that (for the purposes of the stock ticker quotations) "a priority of a few minutes probably is enough" to permit the plaintiff to "gain its reward," and in the *National Telegraph* case, it was found that sixty minutes was enough for the purpose, but the essential point is that the property right exists and is entitled to protection until its value (*i. e.*, the news value as a commercial commodity) has been realized by the producer.

There can be no doubt that the controlling principle of the cases on this subject of news is, in the language of this Court in the *Christie* case, that "the information will not become public property until the plaintiff has gained its reward."

After quoting this language, the court below says (Record, p. 198): "Of course, this means his reasonable reward, and as in that instance of trade quotations, divulging the same to one patron's office full of customers did not reasonably terminate the plaintiff's property right, so here it is reasonable and just that each member of plaintiff and plaintiff itself has a property right in its news until the reasonable reward of each member is received, and that means (with due allowance for the earth's rotation) until plaintiff's most western member has enjoyed his reward, which is not to have his local competitor supplied in time for competition with what he has paid for. Surely this is a modest limit of rights."

National Tel. News Co. v. Western Union Co., 119 Fed., 294, C. C. A., 7, *supra*, cited with approval by the Supreme Court in the *Christie* case, states the same proposition in more detail:—

"The evidence in the record before us shows that they have been appropriating *vi et armis* the news appearing upon the appellee's tape; and, thereupon, with the loss of a few moments only, redistributing such news over their own wires and tickers to their own patrons. Such appropriation is not denied; but is defended as appellant's lawful right, upon the ground, chiefly, that upon the appearance of the printed tape upon the appellee's tickers, in the places of appellee's patrons, there is such a publication as, within the meaning of the law, dedicates the contents of the tape to the public, and deprives appellee of any further monopoly therein." * * *

"It is obvious, also, that if appellants may lawfully appropriate the product thus expensively put upon the appellee's tape, and distribute the same instantaneously to their own patrons, as their own product, thus escaping any expense of collection, but one result could follow—the gathering and distributing of news, as a business enterprise, would cease altogether. Appellee could not, in the nature of things, procure copyright under the Act of Congress upon its printed tape; and it could not, against such unfair conditions, without some measure of protection, compete with appellants upon prices to be charged their respective patrons. And in the withdrawal of appellee from this business, there would come death to the business of appellants as well; without the use of appellee's tape, appellants would have nothing to distribute. The parasite that killed would itself be killed, and the public would be left without any service at any price." * * *

"Standing apart, the symbol or speech is not property. Disconnected from the business in which it is utilized it cannot be monopolized. But used as a method of making an enterprise succeed, so that its appropriation by another would be a distinctive injury to the enterprise to which it is attached, the name, or mark, becomes at once the subject matter of equitable protection. Here, as elsewhere, the eye of equity jurisdiction seeks out results, and though the immediate thing to be acted upon by the injunction is not itself, alone considered, property, it is enough that the act complained of will result even though somewhat remotely in injury to the property.

Considering that in such case, equity, without question, lays its restraining hands upon the injurious appropriation of words that belong to the common language of mankind—than which nothing could be freer to the uses of men—there ought, it would seem, to be no difficulty, in the case under consideration, to find the power so manifestly needful.

The case under consideration may be summed up as follows: The business of appellee is that of a carrier of information. The gist of its service to the patron is that, by such carriage, the patron acquires knowledge of the matter communicated earlier than those not thus served. The ticker, with its printed tape, is an implement or means only to this commercial end, which the patron, or the patron's patron, may utilize to the end intended, but may not appropriate to some end not intended, especially if such appropriation result in injury to, or total destruction of, the

service. In short, the law, being clearly inadequate to that purpose, equity should see to it, that the one who is served, and the one who serves, each gets what the engagement between them calls for; and that neither, to the injury of the other, shall appropriate more.

The immediate business of appellee brought to our attention, in the case under review, may not arouse any great solicitude. It relates to the gathering and distribution of news, not looked upon perhaps, in all quarters, as essential to the public welfare. But the questions raised are of much wider significance. They involve, among others, that modern enterprise—one of the distinctive achievements of our day—which, combining the genius and the accumulations of men, with the forces of electricity, combs the earth's surface, each day, for what the day has brought forth, that whatever befalls the sons of men shall come, almost instantaneously, into the consciousness of mankind. Thus, a gun thunders in a harbor on the other side of the earth; before its reverberations have ceased, the moral sequence of the event has taken root in every civilized quarter of the earth. Famine arises in India to begin its grim march; it has gotten but little underway until a counter army—the unfailing benevolence of human kind—has been mustered from America to Russia. On an isolated island, and without premonition, a mountain claps its black hands upon the population of a city; almost before a ship in the harbor, with tidings of the catastrophe, could have set sail, relief ships from the harbors of Christendom are under way. By such agencies as these the world is made to face itself unceasingly in the glass, and is put to those tests that bring increasing helpfulness and beauty into the heart of our race.

Is service like this to be outlawed? Is the enterprise of the great news agencies, or the independent enterprise of the great newspapers, or of the great telegraph and cable lines, to be denied appeal to the courts, against the inroads of the parasite, for no other reason than that the law, fashioned hitherto to fit the relations of authors and the public, cannot be made to fit the relations of the public and this dissimilar class of servants? Are we to fail in our plain duty for mere lack of precedent? We choose, rather, to make precedent—one from which is eliminated, as immaterial, the law grown up around authorship—and we see no better way to start this precedent upon a career, than by affirming the order appealed from."

Upon the facts of the commercial conditions of this particular business, the period necessary for effective protection of the complainant's rights in these news values created by it, is at least whatever period is necessary to afford opportunity for such complete country-wide publication as to enable every member to realize the full value of the news. *In other words, every member is entitled to its own return for its own contribution to the co-operative product.*

It is really less the question of time than of the nature of the operation. There would hardly be any time when a rival news distributing company like the defendant could lawfully appropriate and sell the complainant's news—meaning by this, not that it could never obtain independently and use the particular fact as news, but only that it cannot take it from us for that purpose, and that so long as our message has *any business value (as news)* which would make it usable by defendant, it belongs to us (see *Board of Trade v. Cella Co., infra*).

The present case is like the Trade Mark cases. They, also, involve the use of words, generally in combination, and an announcement by printing or some similar method, and widespread publicity, but nevertheless the property right which they represent survives for the whole period of their commercial utility to their producer. Precisely like *news*, as a commercial commodity, their *only* usefulness to their owner is in their widespread and complete publication.

Another close analogy is represented by *Fonotipia, etc., v. Bradley*, 171 Fed., 951, C. C., E. D., N. Y., in which an injunction was granted to prevent the purchaser of a phonograph disc from taking matrices of the disc and making records therefrom for sale commercially. In deciding this case Judge CHATFIELD placed his decision upon common law ground and not upon the patent and rested upon the authority of the *Christie* case and the other News Ticker cases cited above, and said that there was no distinction between the two (p. 960). The general principle he stated as follows:

“ We therefore reach the broad question of the power of a court of equity to secure to an individual by injunction the full enjoyment of both corporeal and incorporeal rights in property created by him or at his expense, and capable of taking by another, where such

taking either diminishes or destroys the enjoyment of those rights by the owner and diverts a part of the enjoyment of profits from the rights to the one complained of."

The analogy between that case and the one at bar is clear. Just as the court conceded the right of the defendant to buy phonograph records and use them for any legitimate purpose, but denied the right to use them illegitimately in violation of complainant's rights, so in the case at bar defendant can use defendant's news for all legitimate purposes but not in violation of complainant's rights.

The *Prest-O-Lite* Case (*Prest-O-Lite Co. v. Davis*, 209 Fed., 917, D. C., S. D., Ohio)* also applied (p. 923) the News Ticker cases upon the principle we have stated. That case granted an injunction restraining a purchaser of Prest-O-Lite tanks from using those tanks for resale in its own business in competition with the complainant. The court described the property rights which remained in the complainant even after its sale of the tanks and the analogy to the news property, as follows:

"The purchaser from the complainant gets more than the tank itself. He buys a right and opportunity to participate in the business system complainant has, at great expense, established and maintained. The especial value the tank has is its exchangeability, when empty, for a full tank essentially the same as the other. The popularity of Presto-O-Lite is without doubt due to this fact. By furnishing dealers in all parts of the country with charged tanks for exchange for its empty tanks, and advertising in many ways, an enormous demand has been created by complainant for its tanks and gas. The system of exchange is necessarily highly profitable to the complainant and, in a smaller measure,

* This case was affirmed in C. C. A., 6th Circuit, 215 Fed., 349.

Injunctions were granted in the following cases exactly similar:

Prest-O-Lite Co. v. Avery (N. D., N. Y.), 161 Fed., 648.
Prest-O-Lite Co. v. Post & Lester Co. (Conn.), 163 Fed., 63.
Prest-O-Lite Co. v. Bogen (S. D., Cal.), 209 Fed., 915.
Prest-O-Lite Co. v. Jenkins (Dist. of S. C.). No opinion.
Prest-O-Lite Co. v. Auto Equipment Co. (E. D., Pa.). No opinion.
Prest-O-Lite Co. v. Searchlight Gas Co. (C. C. A., 7th Circuit), 215 Fed., 692. Opinion by BAKER, C. J.
Prest-O-Lite Co. v. Heiden (C. C. A., 8th Circuit), 219 Fed., 845.

to the dealer, and performs a service to the user of the greatest importance. This service and the general knowledge that it may be had is the very life of complainant's business. To the tank, the title of which has passed from the complainant, is attached a quality—the quality of exchangeability practically anywhere in the United States. This quality the complainant has created and it belongs to the complainant and is a valuable asset in its business ” (922, 923).

“Fair competition between the two systems is excellent, but the acts complained of do not involve competition between the two systems. They involve a use by the defendants in the furtherance of their competitive business, and the appropriation, of something of value which actually belongs to their competitor. Instead of using their own system in competition with complainant's system, they actually make complainant's system the very medium through which their gas was introduced to complainant's customers. * * *

“Clearly it was not contemplated by the complainant and a purchaser in its business system that that system should itself be used to further the business of complainant's competitor; and it is equally clear that, if such use is permitted, the result would be a total destruction of the complainant's business system, for anybody anywhere could, by the use of Prest-O-Lite tanks, introduce Searchlight gas or any other similar luminant, and eventually break down the complainant's business” (923).

“* * * but, nevertheless, there is in them a principle which seems applicable to this.

“The great value of complainant's business lies in the interchangeability of its tanks. This quality the complainant has created. It is his, and no one has the right to appropriate it for his own gain to the detriment and even destruction of complainant's business. That quality is incorporeal and intangible, but is property nevertheless. The complainant manifestly having no adequate remedy at law is entitled to have his property protected by a court of equity. This, of course, is aside from any question involved in the ownership of a registered trademark; or any question of deceit. Defendant's wrong does not lie in the mere use of old Prest-O-Lite tanks, but in using them to destroy the complainant's business system for the purpose of, or with the result of, injuring the complainant's business.”

The analogy between this case and the one at bar is the same as that noted under the *Fonotipia* case. Just as the de-

fendant could buy complainant's tanks, so the defendant in the case at bar can buy the complainant's news as appearing in newspapers. But in neither case can a use be made which violates the complainant's intangible property rights which its industry has created.

The following cases illustrate this same principle—by which the producer's intangible property rights are recognized as continuing, even after publication.

The Circuit Court of Appeals for the Second Circuit held in *Universal Film Co. v. Copperman*, 218 Fed., 577, that the Film Company had a common law property right in the intellectual conceptions of one of its plays, both expressed in word and in action, and by virtue of this right could perform it without prejudice to its property rights therein and license others to perform it in the same way; and the Supreme Court in *Ferris v. Frohman*, 223 U. S., 424, held that public representation of a dramatic composition did not deprive the owner of his common law right therein.

See, also, the cases collected in the first point and in the fourth section of this point.

Against these views defendant urges, as we have pointed out above, *dicta* in certain of the cases to the effect that publication destroys the property right.

We show in the next two branches of this point that these expressions are based upon a misconception of the relation between news and copyright. But here we may point out that they are merely *dicta* at any rate and, at least as applied to such a situation as this, are inconsistent with the fundamental principles upon which the cases themselves were decided. For example, in the opinion in the *Christie* case, Mr. Justice HOLMES uses the following language:

"It [news quotations] stands like a trade secret. The plaintiff has the right to keep the work which it has done, or paid for doing, to itself. The fact that others might do similar work, if they might, does not authorize them to steal the plaintiff's."

And the Justice proceeds to hold that these rights were not lost by communication of the news to persons, even if many, who were in the relation of trust and confidence. He did not hold that they would be lost otherwise, and that

question was not before him. It is inconceivable that Justice HOLMES' language can properly be construed as the defendant undertakes to construe it, as saying that if the complainant here should desire to enjoy its property rights in the news which it collects, it should keep that news to itself; because that is to deny the very existence of the property right for the only purpose for which it has any value, and for which it has received judicial recognition as property. Any such construction of his *dictum* with regard to publication would be entirely inconsistent with his statements, which were essential to the decision of the case, in respect to such property rights. Of course the property right to the trade *secrets* to which the Justice refers, depends on their *secrecy*, for that is their property character; but no one could conceive of the Justice's propounding the absurdity that the property right in *news* must depend on secrecy, in spite of the fact that its only property character is in its revelation.

The dicta in the *Kiernan*, *Dodge* and some of the other early cases are evidently put out without special consideration of the peculiarity of this type of property, and are really inconsistent with the fundamental principles on which the actual decision of the cases proceed, and upon which we rely.

For instance, Judge VAN BRUNT said in the *Kiernan* case:

"It would be an atrocious doctrine to hold that despatches, the result of the diligence and expenditure of one man could with impunity be pilfered and published by another."

This is the real heart of his decision, and it is impossible to conceive that he would have actually decided, if the question had been before him, that the only right the owner of the news had in it, as a property right, was to conceal it and so keep it valueless.

These dicta have no doubt been suggested by a desire to conform to the decisions in cases arising under the copyright and patent statutes, like those in the cases cited upon defendant's brief, which have no application to this case. In those cases the rights are created by the statute and necessarily limited by its provisions. As Drone, in his work on copyright (p. 287) says: "Compliance with the statutory provision of publication deprives the owner of his common law right. But as the statute was enacted for his protection, the mode of publication

or the question as to what amounts to publication must correspond to the nature of the right secured."

If, as we contend, the complainant's property right in its news is not created or governed by the statute, but by fundamental principles of law and honesty, and exists quite apart from the statute, the statutory limitations do not apply, and the complainant cannot lose that right except by some voluntary act that amounts in law to a transfer or surrender.

Except for the fact that its own charter and by-laws necessarily prevent, it might assign all rights in its news or only limited rights, either to other agencies or to the public; but all rights not clearly so assigned remain in it. Nothing short of an intentional transfer and surrender of its property right by its own act will destroy it.

No such voluntary surrender for purposes of sale by a competing news agency can possibly be predicated upon the publication of its news by one of its members in the first edition of a newspaper. Such publication is clearly not intended as an abandonment for all purposes. It is merely intended to convey such information to the public for any legitimate use they may make of it. They may not, however, take it and sell it in competition with the complainant. No such dedication was ever intended, nor can it be implied. It would be absurd to assume that for 2 cents, the price of a newspaper, the complainant intends to transfer or surrender to the purchaser the right to use and sell the news contained therein in competition with the complainant. This is especially true in this case in view of the fact that, under its charter and by-laws, the complainant gathers the news merely for its members and has no right to sell it at all, and that no member has any right to sell or transfer or surrender the complainant's or any other member's property therein.

In summary of the true rule, we may conclude our discussion of this branch of the case by quoting the broad statement of the doctrine as laid down by the Circuit Court of Appeals for the Eighth Circuit in *Board of Trade v. Cella Co.*, 145 Fed., 28, page 31, *supra*, as follows :

"The right of property in the quotations endures for a sufficient length of time to enable the Board of Trade to avail itself of the benefits thereof, and if those who are in the position of the defendants are permitted to operate so closely in point of time that they have

practically the same use as one who is authorized to receive them, the right would be of doubtful value."

THIRD: The rule by which literary property is supposed to cease upon an unrestricted publication, without copyright, is entirely inapplicable to the conditions which make and support the status of news as property.

The defendant seeks to escape from the principles above set forth and to justify its appropriation of Associated Press news for its own business purposes, by recourse to the peculiar doctrine of literary property and statutory copyright and relies upon cases arising under the Statute, and dicta in other cases, which, as we have just shown, have no application to this case.

Even if we should assume, however, (contrary to the fact) that news is within that class of property known as "literary property", and circumscribed by all the limitations imposed by law upon such property, the defendant's claim of a right of unrestrained piracy would be invalid, because the publication here is not unrestricted for the reasons stated in the next subdivision of this point and also because the weight of authority appears to be that at common law an author had a permanent right of exclusive publication, and the only question has been whether this right is superseded by the copyright statutes. *Miller v. Taylor*, 4 Burrows, 2303; *Donaldson v. Becket*, 2 Bro. P. C. 129.

Slater on Copyright: Page 9: Referring to the answer of the judges to the questions of the Lords in *Donaldson v. Beckett*, says:

"As, therefore, the owner of any work has by the common law an exclusive right to publish it (Question 1) and that right is not lost after publication by virtue of the common law (Question 2) but is taken away solely by virtue of the Statute (Question 3), it is obvious that if no statute has been passed relative to the particular description of work, the force of the common law will operate to protect it."

Story on the Constitution: Sec. 1152:

"The copyright of authors in their works had, before the Revolution, been decided in Great Britain to be a common law right."

French v. Maguire, 55 How. Pr., 471, in which case the Court said (p. 479):

"It was very early the policy of the common law to protect authors in the enjoyment of the pecuniary benefits of their literary productions. *And these probably extended so far as to include the unlimited right of publication and sale.* But this was afterwards so far changed, on account of the Statute of Anne, by the decision made in the house of lords in the case of Becket and Donaldson, as to exclude the author's rights after publication."

Holmes v. Hurst, 174 U. S., 82, where the Court said, at page 85:

"While the propriety of these decisions [*Donaldson v. Becket*, *supra*, and *Wheaton v. Peters*, 8 Pet., 591] has been subject to a good deal of controversy among legal writers, it seems now to be considered the settled law of this country and England that the right of an author to a monopoly of his publications is measured and determined by the copyright act—in other words, *while a right did exist at common law*, it has been superseded by statute."

Drone on Copyright: 116. "At common law the ownership of literary property is not lost by any publication of the work. * * * The rights and remedies are the same after as before publication. When these rights are lost by publication it is not by force of the common law but by operation of the Statute as it has been judicially construed".

Thus, as to publications such as are involved in the case at bar, which cannot be copyrighted, the common law rights not being superseded by statute, still persist. That news, such as is involved in the case at bar, cannot be copyrighted is apparent from the practical impossibility, for instance, of meeting the requirement of the statute for the filing of two copies or titles of the thousands of dispatches which are sent every day.

And, indeed, this Court has held that the copyright statute was passed in execution of the power given by the Constitution for the promotion of science and that "the term science cannot with any propriety be applied to a work of so fluctuating and fugitive a form as that of a newspaper or price current the subject matter of which is daily changing and is of mere temporary use."

Baker v. Selden, 101 U. S., 99, 105.

All these questions are immaterial, however, because it is so well settled and so plainly obvious that news is not "literary property."

As Judge HOUGH said in his opinion (p. 198) :

"It may be granted that the newspaper first giving out the news in question is copyrighted, that fact statements are not thereby protected as such and that publication at common law terminated an author's rights in his manuscript and the fruits of his brains ; yet it still remains true that plaintiff's property in news is not literary at all, that it is not capable of copyright, and that ' publication ' as that word is used in the long line of decisions regarding literary rights has no determinative bearing on this case. No one before ever attributed to publication a sense that would limit a lawful business to a few degrees of longitude."

The distinction on the facts we have analyzed above. News has no resemblance of any kind to literary property except the accidents that, like trade-marks, it is expressed in words, and in print and on paper. There is no imaginative or intellectual quality in its production, except the imagination and intellect which go into the organization for its collection and distribution. Indeed its character as news disappears when invention or imagination is introduced into its substance, and it then becomes what is known as a "fake."

It is even immaterial whether it is expressed in words of one sort or another or in any order. The news item, for instance, "The Austrian Emperor died to-day", is exactly identical, as a commercial commodity, with the words, "The death of the Austrian Emperor occurred to-day."

Thus the two kinds of property are essentially different in fact, and the reasons which exist for limiting the life of a copyright in respect to the various products of invention or intellectual conception covered by statute or referred to in defendant's brief, such as literary productions, inventions, scientific and business discoveries and the like, are wholly inapplicable to news. In each of the cases referred to the basis or source of the product is the peculiar creative skill of the producer, and, unless others could make use of the product, society would be deprived of its beneficial value, wholly if the creator chose not to sell or distribute it, and partially if he did

so only in a limited way. It is manifest that no second person would be likely solely by his own genius to create exactly the same piece of literature or to make precisely the same scientific discovery. Therefore the law must either give a complete monopoly to the creator, or, in the public interest, give him no rights at all. As regards some such products, public policy is opposed to such monopoly. Accordingly a monopoly for a limited period has been given in some cases by statute and in others such creations of genius are not protected.

News dispatches are in an entirely different field. Their source is not locked in the brain of the producer, but is the *event* to which all persons have equal access. A right in the owner of a certain *report* of this event to prevent an appropriation by others of his report in no sense deprives the public of the benefit of knowledge of the event. Any other person can make a similar report without infringing any of the rights which complainant claims. In other words in this field the law *can* find a distinct middle ground between a complete monopoly in the creator and no rights at all. This middle ground is defined by the relief complainant seeks,—namely an injunction against the appropriation and sale by defendant of complainant's own report of an event, leaving to defendant the right by its own efforts to develop a similar report and even use complainant's report as a guide to the event. This conserves at the same time all interests of the complainant and all interests of public policy, and imposes on defendant no burden except the just burden of making no unearned profit at the expense of the complainant.

And this is a complete answer to the defendant's contention that the result of this injunction will be to arrest competition and create a monopoly in the complainant.

Copying bodily complainant's dispatch is not the only method of competition.

Indeed that method, if justified by the courts, will necessarily destroy all competition and the business itself. The only *fair*, and indeed efficient, method of competition, and one which is fully open to defendant, is the development of a report by the defendant's own efforts.

The inapplicability of the copyright idea and the literary

idea is too plain for discussion and we shall say no more about it, excepting to refer to the passages quoted above from the *National Telegraph Company* case and the *Dodge* case, inviting attention especially to the conclusion of the Circuit Court of Appeals for the Seventh Circuit in the *Telegraph* case, as follows :

" Is the enterprise of the great news agencies, or the independent enterprise of the great newspapers, or of the great telegraph and cable lines, to be denied appeal to the courts, against the inroads of the parasite, *for no other reason than that the law, fashioned hitherto to fit the relations of authors and the public, cannot be made to fit the relations of the public and this dissimilar class of servants ? Are we to fail in our plain duty for mere lack of precedent ? We choose, rather, to make the precedent—one from which is eliminated, as immaterial, the law grown up around authorship*—and we see no better way to start this precedent upon a career, than by affirming the order appealed from." (Italics ours.)

As stated above, this decision was cited with approval by the Supreme Court in the *Christie* case and followed by the *McDermott* and *Tucker* cases, *supra*.

FOURTH. Even if the rule relative to loss of property rights by unrestricted publication were applicable to this type of property, the injunction nevertheless was properly granted, because the publication here is subject to restriction by imperative implication.

The doctrine of loss of property rights in literary property by publication is founded upon the statute which creates the right and expressly makes it dependent upon the condition that the statute shall be complied with "before publication." And yet even in cases arising under the statute, as well as in some of the news ticker and other cases not affected by the statute, the courts have based their construction of what constitutes such a publication as will destroy the property right upon a conception of voluntary dedication to the public. Where a restriction is made either expressly or by implication, the owner's rights continue, however broad and unlimited the publication may otherwise be.

This doctrine of restriction, by implication or expressly, so far as applied to cases outside the statute, has been seized

upon by courts apparently as a means of adjusting the law of literary property and copyright to the business necessities of news service.

We think it is plain that the method taken by the Circuit Court of Appeals for the Seventh Circuit in the *National Telegraph Case* is at once more frank, more sensible, and sounder law. It relies upon the unanswerable grounds that there is an essential difference which makes news a totally different article, legally as it is in fact, from literary property, and that the owner can not lose his property right therein except by his own transfer or surrender, made as consciously and intentionally as would be required in the case of any other property right not limited by statute.

If, however, the courts cannot escape from the rules laid down for literary property and adjust themselves squarely with the facts of the newspaper business, then the complainant is entitled to the same fiction which some of the other courts (not the Circuit Court of Appeals for the Seventh Circuit) thought it necessary to raise in the news ticker cases.

From the decision of the *Kiernan Case* by Judge VAN BRUNT in 1876 (50 How. Pr., 194, *supra*), down to this date, there has been no case that we can find in which injunction has been denied for lack of express or implied restriction in the publication of news or matters analogous to news; except that in 1900, before decision of either the *National Telegraph Case* by the Seventh Circuit Court of Appeals or the *Christie Case* by the Supreme Court, Judge SEAMAN declined to grant a *preliminary* injunction because he was doubtful whether the ticker and blackboard publications might not have amounted to a surrender of the property rights, *Board of Trade v. Thompson Co. et al.*, 103 Fed., 902. On final hearing, however, in 1901, he allowed the injunction. *Board of Trade v. Haddon-Krull et al.*, 109 Fed., 705.

Tribune Co. of Chicago v. Associated Press, 116 Fed., 126 (Feb., 1900), relied upon by the defendant, was also decided by Judge SEAMAN, but prior to the decision of the Circuit Court of Appeals for his Circuit in the *National Telegraph case*, and also prior to his own decision in the *Haddon-Krull case* (in 1901), though reported in a later volume. It is, therefore, no authority; and it also was decided upon special grounds of copyright, which are inapplicable here, as we have

shown, and without any consideration at all of the points here involved.

There is authority, however, in a case enjoining the appropriation of quotations from a news ticker, which it is impossible to distinguish on its facts or in principle from this. The Circuit Court of Appeals for the Second Circuit held in *Board of Trade v. Tucker*, 221 Fed., 305, page 307, that "the posting of these quotations on a blackboard in the office of a subscribing broker is not the sort of publication which will terminate complainant's property right in them."

If it be said that not everybody could go into brokers' offices, it can equally be said that not everybody can buy or read a newspaper, or reach or read a bulletin board; if it be said that there was an implied restriction against the republication of the items in competition with the Telegraph Company, the same is true here; or if it be said that the broker who owned the office was under contract not to use the news for supplying other ticker companies service, the same is true here, because the Associated Press sends its news to its members with the same restriction, and the publication or posting by the members is no more complete and open than the publication and posting by the broker.

Nor can the case of the *Board of Trade v. McDermott Commission Co. et al.*, 143 Fed., 188 (C. C., W. D., Mo.), *supra*, be distinguished in any way. The stock ticker news there concerned was proved to have been publicly displayed, and yet an injunction was granted against a rival ticker concern which copied the items from blackboards in Chicago and got them posted in Kansas City within five minutes. The restriction of even public blackboard display was well explained by the Court as follows:

"The merchant displays his goods in windows and upon the streets to attract attention and to invite trade; but this does not authorize his competitors or others to appropriate the property so displayed without compensation nor does it in any way deprive the owner of his right of protection to all of his property rights therein" (pp. 190-1).

Of course it is perfectly obvious that the purpose of newspaper bulletin boards is the same as that pointed out in this pas-

sage;—it is the advertisement of the newspaper, not a surrender of its value.

However, as we have said, all this manipulation of the publication idea ought to be eliminated, as the Circuit Court of Appeals for the Seventh Circuit frankly did eliminate it. None of the ticker tape cases are really cases of restriction in the number or identity of the persons who are to be allowed to read them. No one really believes that the ticker tapes which come out from the news tickers all over this country, in practically every broker's office, every hotel of importance, all great restaurants, great numbers of saloons, and in multifold transcriptions on blackboards are really restricted, excepting as they are restricted by fundamental principles of fair dealing and the restraints against misappropriation.

There is, however, a real restriction, if it be material to find one, and that is the one which is implied against the *use* to which the readers may put the ticker news. *Every* adult man can see the items if he wants to and obtain the information contained therein, but *nobody* is intended to be given any right to take them off the blackboard or from any ticker tape for commercial sale as news.

The fact that even in cases arising under the copyright statute there may be two kinds of restriction (first, a restriction to a limited class; second, a restriction upon the use, even though the whole world has access) is clearly shown in *Werckmeister v. Am. Lith. Co.*, 134 Fed., 321 (affirmed, 207 U. S., 299), where it was held that it was not a dedication of a picture to exhibit it in a public gallery where no one was allowed to copy pictures, and where a fee of admission was charged. The Court said:

“There may be a general or limited publication. The use of the word ‘publication’ in these two senses is unfortunate and has led to much confusion. * * * The nature of the property in question in large measure determines the extent of public right. * * * The result of an examination of the authorities seems to show that the following propositions are established: A general publication consists in such a disclosure, communication, circulation, exhibition, or distribution of the subject of copyright, tendered or given to one or

more members of the general public, as implies an abandonment of the right of copyright or its dedication to the public. Prior to such publication, a person entitled to copyright may restrict the use or enjoyment of such subject to definitely selected individuals or a limited, ascertained class, *or he may expressly or by implication confine the enjoyment of such subject to some occasion or definite purpose.*" (Italics ours.)

The point is very clearly put by the Supreme Court of Massachusetts in *Tompkins v. Halleck*, 133 Mass., 32, 43 Am. Rep., 480. The Court emphasized the fact that plays have more than literary value, in the peculiar value "which they have by reason of their capacity for scenic representation." It affirms the theory that an owner's right to the protection of the Statute is lost by dedication, but says :

" But the question is as to the extent of that dedication. * * * It is not that the spectator learns the whole play which entitles the author to object ; *it is the use that is sought to be made of that which is learned which affords just ground of complaint.* * * * If the spectator desires, there is no reason why he should not be permitted to take notes for any fair purpose. * * * *It is the use intended to be made that renders it proper to restrain such an act.* * * * In whatever mode the copy is obtained, *it is the use of it for representation which operates to deprive the author of his rights.*" (Italics ours.)

Just as in the above case a play has a peculiar value because of its capacity for scenic representation, so in the case at bar the news has a peculiar value, indeed its only property value, as a business commodity. Just as the whole public can witness a play, but cannot use it in competition with the producer, so in the case at bar the whole public can read the news and obtain and use the information contained therein for any proper purpose, but not for sale in competition with the complainant.

The case of *Tompkins v. Halleck*, *supra*, was followed by *Aronson v. Baker*, 43 N. J. Eq., 365, where the Court said :

" The rule which I think should be adopted may be stated as follows : that the owner of a dramatic or musical composition may, like the owner of any other kind of property, do with his own as he pleases ; he may retain it for his own use and benefit, or he may give it to the public out and out, or

he may make a limited or partial dedication of it, and when his act of dedication is of such a character as to show unmistakably that he does not intend to abandon all right, but simply to give the public the right to have a limited use of his property, or to use it in a particular way, and to reserve to himself whatever is not plainly given, the public acquire the right to use his property *to the extent of his dedication, but nothing more*, and any use of it in excess of the extent dedicated is in violation of his reserved rights."

The publication of Associated Press news by its members is no more a dedication of that news to the readers for all purposes than are the performances of plays which, however public, have been held not to include a dedication for purposes of reproduction from memory.

Boucicault v. Fox, 5 Blatch., 87; Fed. Cas. No. 1691;

Boucicault v. Hart, 13 Blatch., 47; Fed. Cas. No. 1692;

Croce v. Aiken, 2 Bess., 215; Fed. Cas. No. 3441;

Universal Film Co. v. Copperman, 218 Fed., 577;

Ferris v. Frohman, 223 U. S., 424;

or the public delivery of lectures (even with provision of printed copies for students) which were held not to constitute a dedication for redelivery or republication.

Drummond v. Allenus, 60 Fed., 338;

Abernathy v. Hutchinson, 3 L. J. Ch. 209;

Bartlett v. Crittenden, 4 McLean, 300, Fed. Cas. 1082; 5 McLean, 32, Fed. Cas. 1076;

Nicols v. Pitman (1884, L. R. 26 Ch. Div., 374);

Caird v. Sime, 12 App. Cas. 326;

or the exhibition of pictures and publication of engravings which have been held not to be such a dedication as permits publication of copies not authorized by the author.

Werckmeister v. Am. Lith. Co., *supra*, p. 41.

Turner v. Robinson, 10 Ir. Ch. Rep., 121.

The kinds of property in all these cases are like news in that they were put out for everybody to observe, for everybody to think about or talk about, or use in any way except for reproduction or sale in competition with the original pro-

ducer, in respect to which they are subject to restriction implied in their very nature.

No express reservation could possibly be clearer than the necessary implication inherent in the very conditions of the business as before stated.

No honorable business man could possibly assume that the publication, upon which the defendant relies to justify its piracy, is intended to be a voluntary consent to it; or that the publication of The New York Times shortly after midnight is a consent to its reprinting before breakfast by the defendant; or that the publication of Associated Press news in a single New York paper was intended instantly to destroy the property interest therein of all the Western papers which have equally contributed to the cost of its production.

Moreover there is obviously no abandonment to the public until there has been a full and complete publication. Owing to the nature of the news distributing business the publication involved is necessarily a nation-wide publication. In other words the publication throughout the country is a single publication. This was the view of the District Court, as stated in its Opinion as follows :

"The publication intended, and generally effected, is one substantially simultaneous throughout the country, that is, so far simultaneous as geographical differences in time may permit. It cannot, therefore, be said that the complainant has in any fair sense caused its news to be published and thus abandoned to the public until all the members whom it serves have been put in a position where publication of the news has been possible. Viewed in this reasonable light, the argument that the complainant has no further right to protection after the first publication of its news loses much of its force. The news is in effect unpublished and unavailable for use by competing news agencies until the time for general publication has elapsed, since only then can the complainant be truly said to have abandoned its news to the public by an unrestricted publication" (p. 188).

This is particularly true of a co-operative association like the complainant. Each member has an equal interest in the news gathered at the expense of all. *It must be clear therefore that a member publishing a newspaper on the Pacific*

Coast cannot be said to have abandoned his right to such news because, three hours before he has received or been able to publish it, some other member has published it in New York City. Not until each of complainant's members has realized the full competitive value of the news is the publication by the complainant complete. Throughout the whole of this period, required for complete publication, the complainant reserves all rights of distribution and sale of the news it has gathered.

Judge HUGH said (p. 199) :

" We have assumed the newspaper first printing to be copyrighted, and no doubt its publication of its early edition was a general publication ; but it could not copyright, abandon nor destroy what it did not own ; and it did not own plaintiff's property, in the news, nor that of its own fellow members in California. It did own the right to print in New York, but we discover no magic in the word ' publication ' which takes away or terminates the rights of others.

" Plaintiff's purpose in furnishing the (*e. g.*) New York paper with news, was to have a use made of it, not inconsistent with its own reasonable reward for its labor from its property, and that of all the other members of plaintiff. That measure of use and reward is lawful ; defendant deprives plaintiff thereof, and can show no equities ; therefore defendant should be enjoined."

THIRD POINT.

Complainant is also entitled to the injunction, both at common law and under the Federal Trade Commission Act, against the unfair competition of the defendant at any time and by any means whatever.

By section 5 of the Federal Trade Commission Act, approved September 26, 1914, it is provided "that unfair methods of competition in commerce are hereby declared unlawful."

Both under this statute and under established rules of common law, the record shows that the complainant was

entitled to an injunction restraining defendant from taking and selling complainant's news upon the ground of unfair competition.

FIRST: The defendant's practice of taking our news from early editions and bulletins and distributing and selling it bodily without any original investigation and without any expense is, in fact and effect, unfair business competition.

The defendant claims the right to take the news, collected by us at great expense, and, without the labor or expense of any original investigation, to use it bodily as a commercial asset in competition against us and so as to deprive us of the fruits of our labor and capital. This unquestionably constitutes unfair competition both in fact and in law.

There are two basic considerations of fact which control the Courts in passing upon competitive methods in such a situation as this :

First, fairness as between the parties in regard to their private interest, which means, summarily (so far as concerns this case), that no man can fairly be permitted to compete against his rival out of the rival's own pocket, or as LORD MANSFIELD said : "It is certainly not agreeable to natural justice that a stranger should reap the beneficial pecuniary produce of another man's work ".

Second, the public interest in the efficiency of industry as the public's only means of supporting life.

On both of these principles complainant is entitled to this injunction to the full extent of its prayer.

On the first consideration—fairness as between the parties—we hardly need add anything to the discussion under Points I. and II. of this brief, but we may again point out here that the defendant's practice is, in fact, an appropriation without cost to itself of values created by us. The effect is to make the collecting agencies, which we have established and are operating all over the world at great cost, the direct servant and source of supply for business goods to be distributed and sold by the defendant.

The defendant's practice not only takes the advantage of

our capital and labor but it also deprives us, and our members, of the fruits thereof, because it is impossible for us to enjoy the proceeds of this vast machinery, operated at a cost approximating three and a half millions a year, if we are entitled to receive merely the price of one paper sold for two cents.

The complete country-wide publication of the news collected by us is the only possible way in which the complainant can "gain its reward" (to quote the phrase of the Supreme Court in the *Christie* case, *supra*) for its worldwide organization and expenditure, and it is the very foundation upon which the whole business rests. The defendant's idea that the *collecting* labor and expense can be severed from the *distribution and reimbursement* is nothing but a claim that it can fairly enjoy the profit end of our business while we endure the expense end. On such a basis, the expense end—which is the production end—must eventually disappear, and with it the whole industry.

The situation is equally clear in regard to the second fundamental principle—the public's own interest in the efficiency of industry, as its means of supporting life.

The argument of defendant's counsel seems to be based on an idea that news is a sort of physical raw material which flows automatically from all over the world, and automatically supplies a reservoir the tapping of which ought, in the public interest, to be free to all, without charge. This is the "monopoly" idea to which defendant's counsel refer.

From the point of view of public policy and the public interest, the situation in the true facts of this business is almost exactly the reverse. The world's news is not an automatic stream filling a reservoir to which the public interest would give everybody free access. It is a product created and transported at vast expense which can be supported *only* from the proceeds of its distribution and sale. The collecting business is not separate and independent from the distributing and selling business, but inextricably attached to it and absolutely dependent upon it for very existence. The collecting end is the output and the selling end is the income.

Counsel said in the Court below :

“ Whether you get a paper that is served by one press association or the other, or by both, the public gets the benefit of all the news collected by two independent associations.”

Of course, in a sense, any buying public gets at least some temporary advantage from an opportunity to purchase any producer's product from some one else, at less than the producer's cost, but even that advantage does not survive the destruction of the producing work which must inevitably result from it,* and even, so long as it does last, it is an unconscionable benefit and one to which the public is not entitled. Indeed the public welfare never can be promoted by condoning or encouraging unfair, inequitable or dishonorable practices.

Moreover, where one news agency takes its news from another the public does not get the benefit of “news collected by two independent associations.” Its interests will be better served by the efficient administration of both associations required by fair competition between them.

If, then, this Court establishes as the basis of the law controlling this business of news gathering and publication, a proposition that the only return to which the complainant is entitled for discovering and bringing to this country all the news of the world is the right either of putting it on a bulletin board *for nothing*, or publishing it in *one* paper sold *at two cents*, and that a competitor may then take without cost its product and sell it in competition with the complainant, then the Court absolutely undermines the business altogether.

Therefore we say that not only the fundamental principle of fair competition in business, by which equity will enjoin a competitor from appropriating to himself values created by his rival, but also the great public interest in the dissemination of news demands the granting of this injunction to the full extent and in the broadest terms.

* See the sentence quoted, *supra*, from the *National Telegraph* case :—
 “ *The parasite that killed would itself be killed, and the public would be left without any service at any price.*”

SECOND: Under such circumstances the defendant's copying and using the complainant's news for sale as a commercial product is unlawful under the established authorities.

It is entirely immaterial whether the defendant gets our news by bribing employees in confidential relation, by inducing breaches of contract by our members, by reading from our Morkrum machines (all of which are acts in and of themselves subject to injunction on independent grounds)—or by voluntary revelation from our employees, or by taking it from our bulletins and early editions—*so long as the use it makes of the news, however acquired, is to compete unfairly with us*, to obtain the fruits of our labor and expenditure free of cost, and deprive us thereof, and so threaten the very existence of the whole business organization of news collected throughout the world.

The defendant argues in its Brief (p. 65) that "none of the elements of unfair competition are to be found in this case" and bases its argument upon the curious reason that in taking and selling our news "it did not pretend that the news which it distributed was that of the Respondent," but sold it as its own as if gathered by its own independent efforts, and at page 68 it says "When all is said and done, it means only that the petitioner, when it sent out the news which it thus acquired, sent it out not as another's, but in its own phraseology and as its own. It made no claim that the news had been collected by another and does not seek business upon a false representation to that effect."

We do not believe that this Court will be much impressed by the argument that a theft is less a theft because it is concealed.

When the defendant seizes the product of our labor and expense and sells it in competition with us, the "competition," which, as the defendant seems to concede, would be unfair if it frankly admitted that it was selling our news, does not cease to be so because it falsely claims that the news is the result of its own independent effort.

Surely the application of the doctrine of "unfair competition" does not depend upon any such distinction as that. The appropriation and use of our news in competition with us

is just as unfair to us, and even more so, if it is sold upon the false representation that it was obtained by the defendant's own efforts as if it were frankly accredited to us.

Our contention is that in either case it must impress every fair-minded man as being fundamentally unfair that the defendant, without expense, shall take the news gathered at great cost by us and, sell it in competition with us.

The defendant, however, appears to think that because it pays two cents for a newspaper it may fairly use the news, contained in it, for any purpose.

As we have before shown, it is perfectly consistent with fairness and equity and the business existence of the news collecting agencies that anyone should copy news from any published newspaper or bulletin board and use it in any way in which the public ordinarily uses information. In other words, copying news is not unlawful in and of itself, and the defendant therefore assumes that it is not unlawful even when it is done and the result is used systematically as a method of business competition, and as a means of getting the advantage of complainant's labor and expenditure without any payment therefor, beyond the two cents which the newspaper costs or, if it is a case of copying from a bulletin board, entirely free of expense.

As well might a manufacturer argue that he was entitled to use his rival's trade-mark for competitive commercial purposes, merely because he may lawfully purchase a package marked with it and, in common with the public, is allowed to see it and talk about it and use its symbols for any non-commercial purposes.

Such contentions are directly in the teeth of the cases we have discussed in Point II., *supra*, which are based in part on the unfair competition principle, as well as on the property rules. We shall not repeat the discussion of those cases here, except to quote the analysis made of them from this particular point of view, in the book entitled "Trust Laws and unfair competition," issued by the United States Bureau of Corporations, on March 15, 1915.*

* This book will be submitted to the Court herewith.

" SECTION 6. APPROPRIATION OF VALUES CREATED BY
COMPETITOR'S EXPENDITURES.

" A peculiarly subtle form of competition is disclosed in the appropriation in diverse ways of values created by a competitor's expenditures. Such a method of obtaining a rival's patronage and at the same time profiting by his pioneering in a particular business has been attempted, among other ways, by surreptitiously or openly taking information which another has collected for sale at large expense, and disposing of it in competition with the owner; by duplicating and selling another's articles, where, without the use of the original, a competing article could not be had at all, or could be produced only at great expense; by filling and selling a competitor's receptacles without entirely obliterating his name and that of his product and without any express notice to the purchaser that the receptacle did not contain the same article with which it was originally filled. The cases of this description are apparently limited in number and, while they show a tendency on the part of the courts to prevent one from dishonestly acquiring the benefits of another's investments and labor, the limit of the doctrine does not appear to be as yet well defined.

" AMERICAN DECISIONS.

" An illustration of the principle is found in a decision of the Supreme Court of the United States in 1905, where it was held that the Chicago Board of Trade, which permitted certain telegraph companies to have its quotations for transmission to parties approved by it, could enjoin a company, which secured the quotations in some unknown manner, from distributing them to others. In this case it was held that the exchange did not lose its property right in the quotations by communicating them to telegraph companies (*Board of Trade v. Christie Grain & Stock Company*, 198 U. S., 236 (1905)). In a subsequent case the same court held that quotations on the New York Cotton Exchange were the property of the exchange, and that it could control the distribution in such a way as it saw fit (*Hunt v. New York Cotton Exchange*, 205 U. S., 322 (1907)). Similarly where a telegraph company, at considerable expense, collected news relative to certain

prices of securities, race track, baseball and other events, it was held that the company's property in the news, which consisted largely in making it available in the shortest possible time after the happening of the events reported, was entitled to protection, and that this company could enjoin another from taking the news from its tape in the office of its patrons and delivering it with only a few moments loss of time to its own customers (*National Telegraph News Co. v. Western Union Telegraph Co.*, 119 Fed., 294 (C. C. A., 1902)). See also *Board of Trade v. Hadden-Krull Co., et al.*, 195 Fed., 705 (C. C., 1901); *Illinois Commission Co. et al. v. Cleveland Telegraph Co. et al.*, 119 Fed., 301 (C. C. A., 1902); *Board of Trade v. Cella Commission Co. et al.*, 145 Fed., 28 (C. C. A., 1906); *Kiernan v. The Manhattan Quotation Telegraph Co.*, 50 How. Prac., 194 (N. Y. Sup. Ct., 1876); *Board of Trade v. Tucker*, 221 Fed., 305 (C. C. A., 1915)). And a company which collected advance information respecting the proposed construction of buildings, sewers, waterworks, and other public works, which it sold to subscribers under contract that it should be held in strict confidence, was granted an injunction restraining another from procuring the information from its subscribers and selling it in competition with it (*Dodge Co. v. Construction Information Co. et al.*, 183 Mass., 62 (1903)). The same principle appears to have been applied to entirely different facts in *Fonotipia Co. (Ltd.) et al. v. Bradley* (171 Fed., 951 (C. C., 1909)). There the Fonotipia Co. manufactured records for use on graphophones. The Continental Record Co. manufactured records from a matrix produced by them from the commercial records of the Fonotipia Co., and sold them in competition with it, advertising them at greatly reduced rates and as reproductions of the voices of artists under contract with the Fonotipia Co., asserting also that the records were identical with the originals. The Fonotipia Co. was granted an injunction restraining the rival company from selling copies of its records, the court holding it to be wrongful appropriation of the property of the Fonotipia Co. Similarly, where a company manufactured illuminating gas called *Prest-O-Lite* for use on automobiles, and sold it in containers of peculiar construction, and had established depots in all the larger towns of the United States, where an empty container could be immediately exchanged for a filled one, it was held that the company could restrain a dealer from having said containers filled with a competing gas and disposing of them in competition with it

without first obliterating therefrom the company's name, the word "Prest-O-Lite" and any other marking identifying the container with the manufacturer of Prest-O-Lite (*Prest-O-Lite Co. v. Davis, et al.*, 209 Fed., 917 (D. C., 1913)). Cf. *Victor Talking Mach. Co. v. Armstrong*, 132 Fed., 711 (C. C., 1904). So also a company which had incurred the initial expense of a series of advertisements by publishing a picture of a young woman with the words "Wink at the grocer and see what you will get, K. T. C.", for the purpose of exciting curiosity and attracting the attention to subsequent advertisements that would disclose the character of the goods advertised and the name of the manufacturer, was granted a preliminary injunction restraining another from publishing advertisements in such form as to create the belief that its goods were referred to in the advertisement first issued. (Case not reported.) The case was not carried to a final hearing. On the other hand, the St. Louis court of appeals held that a laundry company which had inaugurated a similar series of advertisements by having an advertising company publish on signboards and cards the word "Stopurkicken" could not recover from an envelope company which, with knowledge of the purpose for which public attention had been directed to the word, itself printed and distributed a large number of cards bearing that word, followed by the name of the envelope company (*Westminister Laundry Co. v. Hesse Envelope Co.*, 156 S. W., 767 (St. Louis court of appeals, 1913))."

Beyond this line of cases which, with the exception of the last case (where the two businesses were not in competition), are directly in point on their facts, there are numerous decisions which dispose of defendant's theory that because it can lawfully buy and read and even copy the complainant's news it can sell and use it in competition, regardless of the circumstances and effect.

The idea that a practice must be "unlawful *per se*" before it can be enjoined as unfair competition, was exploded by Mr. Justice HOLMES in his book on the Common Law, page 75, in which he showed that "no act is unlawful *per se*."

There are a multitude of cases which illustrate the point and indeed the modern law for the control of competition in business and the development of monopoly depends to a very large extent upon the principle that even acts which might be

innocent and lawful if done under other circumstances are injurious and unlawful if they operate unfairly in competition.

In *Aikens v. Wisc.*, 195 U. S., 194, 200, the defendant claimed that what he was doing was perfectly lawful,—that he had a perfect right to refuse to take advertisements from anyone. This proposition could not be disputed as a general principle, but the Court held, nevertheless, that defendant could not lawfully base his refusal to take the advertisements upon the fact that the advertiser was also patronizing a rival paper, and so put the business community to a choice between losing the superior advantage of the defendant's own columns and refraining from advertising in the rival. The Court held that even this conduct by the defendant, which would be quite within the defendant's rights ordinarily, became unlawful when it was made a mere device for unfair competition.

In *U. S. v. Eastman Kodak Co.*, 226 Fed., 62, 74; 230 Fed., 522, 524, an exclusive contract by which the Kodak Company gained control of the entire supply of photographic paper was held unlawful because entered into by the Kodak Company, not to supply its own legitimate needs, but to exclude the other dealers.

In *U. S. v. American Can Co.*, 230 Fed., 859, 887-8, a preferential rebate for the purpose of disadvantaging other manufacturers was held to be unlawful, though the defendant company was not a common carrier and was ordinarily entitled to make any price it pleased.

Other instances of Unfair Competition established to be unlawful by the Federal Courts, notwithstanding the inherent innocence of the acts, are the use of "Bogus Independents," contracts for exclusive dealing, and "tying clauses," the authorities upon which are collected in the above cited book ("Trust Laws and Unfair Competition") at pages 463-486, 496-7, and 117-8.

The whole subject was discussed from the point of view of broad legal principles by the late Dean Ames, in his Article entitled "Tort Because of Wrongful Motive," in 20 Harv. Law Review, 420.

One of the most interesting cases there discussed is the Barber Shop case—*Tuttle v. Buck*, 107 Minn., 145, 119 N. W., 946. It was a case where a very rich man took a spite against a barber and resolved to put

him out of business. To accomplish this purpose, he established a rival barber shop next door to the other, provided it with unlimited means, and made it so much more attractive and cheaper, regardless of expense, that he soon accomplished the result. The Court recognized that under ordinary circumstances and for normal purposes the defendant had an absolute right to go into the barber shop business, put his shop where he liked and run it as he pleased, but nevertheless they granted the injunction because he was doing these things for the purpose of destroying the plaintiff's business.

Another interesting case, also at common law, is *Dunshee v. Standard Oil Company*, 152 Iowa, 618, 626, 132 N. W., 331. The Crystal Oil Co., a retail dealer in oil, originally purchased its supply from the Standard Oil Co., but later began purchasing in part elsewhere. The Standard Oil Co. thereupon went into the retail business itself, not for the purpose of establishing a retail trade, but as a mere temporary expedient to drive out the Crystal Company, and this being accomplished, it returned again to the wholesale trade exclusively. The Defendant urged that it had the absolute right to go into the retail business for whatever purpose it pleased, and in whatever way it pleased. The Court conceded this general proposition, but granted the relief on the ground that these otherwise innocent acts became unlawful because of their purpose and effect.

The decisions in the "Fighting Ship" cases are based on the same principle.

U. S. v. Hamburg American S. S. Line, 216 Fed., 971, 973, 974.

U. S. v. Hamburg-American' Packet, 200 Fed., 806.

U. S. v. American-Asiatic S. S. Co., 220 Fed., 235.

The Eastern States Retail Lumber Dealers' Association attempted to compete by circulating lists of dealers with true information about them, with the purpose of putting a ban upon them, and inducing an important body of possible customers not to deal with them, but this Court held (*Eastern States Retail Lumber Dealers' Association v. U. S.*, 234 U. S., 600, 614), that the practice was unfair competition and unlawful, even though all

the statements of the circular were absolutely true and could have been made for any ordinary purpose.

Even free speech was held to be subject to the condition that it should not be used unfairly in competition (*Gompers v. Bucks Co.*, 221 U. S., 418, 437-8) where the circulating of lists which merely said "We do not patronize" was held unlawful as unfair competition.

Ordinarily a competitor can further his business by selling below other men's prices. Indeed that is the normal method of competition. He can even sell below cost for the purpose of reducing loss of excess stock; but he cannot do either of these acts in such a manner, and for such a purpose as will drive a competitor out of business, by discriminating or local reductions of price, for example. *Nash v. U. S.*, 229 U. S., 373, 376; *Standard Oil Co. v. U. S.*, 221 U. S., 1, 43; *Central Lumber Co. v. South Dakota*, 226 U. S., 157, 160; *U. S. v. Great Lakes Towing Co.*, 208 Fed., 733, 743-5; *U. S. v. Pacific Co.*, 228 U. S., 87; *U. S. v. American Can Co.*, 230 Fed., 859, 887-8; *Ware-Kramer Co. v. American Tobacco Co.*, 180 Fed., 160, 167.

Such abuse of the price-fixing liberty has been made unlawful by specific legislation in 23 States (see the analysis of the Statutes in the document cited *supra*, entitled "Trust Laws and Unfair Competition," pages 187-191) and also by France *ib.*, 579-582; Belgium *ib.*, 591, and Germany *ib.*, 650.

The cases we have cited above, however, establish that these practices are unfair competition even without a statutory provision denouncing them specifically. They are but particular methods which fall under the general term "Unfair Competition."

FOURTH POINT.

The defense of "unclean hands" is entirely without foundation either in law or in fact.

The order of the District Court, after finding (Findings 4, 5 and 6, p. 5), that the defendant has appropriated complain-

ant's news by the three methods before referred to, finds, as established to the satisfaction of the court :

" (7) That complainant has not authorized any of the aforesaid practices, and such instances, if any, as may have occurred have been contrary to its rule " (p. 6)

and

" (8) That the complainant's rules and the practices, authorized by its officers, have been to use defendant's published dispatches only as rumors, and to cause them, if important, to be investigated at the points of origin by complainant's own representatives, and at its own expense, and then distribute to its members such reports as its own investigations shall have justified."

The District Court, in its opinion, states upon this subject (pp. 180-81) :

" The strongest objection urged by the defendant to the granting of any injunction is based upon the charge that complainant has been guilty of continuous abstraction of defendant's news, and therefore should be debarred from seeking the aid of a court of equity.

" I think the complainant has established that such practices, if they have existed, were contrary to the rules of The Associated Press and the careful direction of its officers and manager, and were limited to but a few sporadic instances at most."

And Judge HOUGH, in his opinion upon the appeal, says (p. 195) :

" Plaintiff does not and has not copied and sold news from bulletins, etc., of papers using defendant's service, and the tip habit, though discouraged by plaintiff, is incurably journalistic."

The courts below accordingly decided that the defense of "unclean hands" had not been sustained, and that decision is fully supported both by the law and the facts.

FIRST: As a matter of law the charges made against the complainant by the defendant's answer would not bar complainant from relief, even if they were true.

1. *Even if (contrary to the fact), the employees of the respondent by its authority had made a practice of taking the defendant's news from bulletin board or early editions of news-*

papers published by its patrons and using it bodily without independent investigation, that would not constitute a defense, or deprive the respondent of the relief granted herein.

The "unclean hands" doctrine, upon which the defendant relies, applies to a taint in the right which the complainant is seeking to enforce, and not to a merely collateral or prior guilt on its part. This rule does not mean that whenever a complainant has been guilty of inequitable conduct, the courts will refuse to grant him equitable relief. It means merely that a court of equity will refuse to aid a complainant in protecting any right acquired or retained by inequitable conduct.

It will refuse to place itself in the position of protecting or promoting anything which is opposed to fundamental principles of morality or justice, but it will not deny relief, to which a plaintiff is otherwise entitled, merely for the purpose of punishing him for any misconduct not connected with the relief sought.

This distinction is made in the *Christie case*, 198 U. S., 250 (*supra*). The Circuit Court of Appeals for the Eighth Circuit decided that case upon the ground that the business done upon the Chicago Board of Trade included gambling in grain and other produce, which was forbidden by the statutes of Illinois, and accordingly held that a court of equity would not protect it. The Court said (125 Fed. Rep., 161, 169):

"It will not lend its aid to the furtherance of transactions expressly forbidden by the statute, and thus declared to be contrary to the public policy of the state in which the transactions were had. In seeking the aid of the court, under the circumstances developed in the evidence introduced in this case, the Board of Trade does not come with clean hands, nor for a lawful purpose, and for these reasons its prayer for aid must be denied."

This Court, in reversing the decision, said:

"But suppose that the Board of Trade does keep a place where pretended and unlawful buying and selling are permitted, * * * it does not follow that it should not be protected in this suit * * *. If then the plaintiff's collection of information is otherwise entitled to protection, it does not cease to be so, even if it is information concerning illegal acts. The statistics of crime are property to the same extent as any other

statistics, even if collected by a criminal who furnishes some of the data."

The same distinction is drawn in *Wilder Mfg. Co. v. Corn Products Co.*, 236 U. S., 165, 172.

The "clean hands" doctrine was properly applied in *Prince Manfg. Company v. Prince's Metallic Paint Company*, 135 N. Y., 24, relied upon by the defendant, where the court refused to protect the plaintiff in the use of a certain trade name because the plaintiff was using *this name* to deceive the public. To the same effect are *Fetridge v. Wells*, 4 Abb. Pr., 144, and *Manhattan Medicine Company v. Wood*, 108 U. S., 218.

The court in each case refused to interfere or to protect the plaintiff's trade name, which he was using to deceive the public, on the ground that an injunction would be directly furthering the inequitable practices of the plaintiff.

The present case has no analogy to these. The Associated Press is not seeking any such protection in behalf of inequity on its part. The injunction sought is to prevent the defendant from unlawfully appropriating news lawfully acquired by the complainant. It is no defense to such an application that the complainant in the past has been guilty of unlawfully appropriating the defendant's news even if it were true, which it is not.

In the first place, in that case the two trespasses, one by the defendant and the other by the complainant, would not relate to the same property. If the complainant were asking a court of equity to enjoin the defendant from appropriating news which complainant had taken from the defendant, the doctrine might apply; but that clearly is not the case because it is obvious that the defendant would not be taking from the complainant news which the defendant had already acquired itself. It is, therefore, like a case of two independent trespasses, in which each trespasser would be subject to injunction but neither one could successfully set up the defense of unclean hands.

In the second place, the injunction for which the complainant asks is for the future. It does not apply to past news and the complainant's bill does not ask any accounting or redress regarding any past appropriation of its news. The claim, therefore, that the complainant has in the past un-

lawfully appropriated news from the defendant would constitute no defense even if it were true, which it is not. It is manifest that any past misconduct cannot affect complainant's right to have the news which it shall gather in the future protected against the defendant's inequitable actions. Such a result would substitute outlawry and warfare for law and equity. The defense, of course, cannot be based upon any future unlawful action of the complainant, for that cannot be assumed or anticipated, and, if it could be with any certainty, the proper way for the defendant to protect itself would be by injunction.

And, indeed, that possibility is fully covered by the fact that in this case the complainant has voluntarily offered to submit to a like reciprocal injunction in favor of the defendant, as appears from the order in the District Court.

The principle upon which courts of equity will apply this maxim is clearly set forth in the opinion of L. HAND, J., in *Primeau v. Granfield*, 180 Federal, 851 (S. D., New York), :

"While I am not wholly satisfied that the parties entered into a contract involving the swindling of Primeau's customers as an incident to its performance, certainly that is the worst construction that the evidence admits and for the purpose of argument I will assume it to have been the fact. After Primeau got the money he turned it over to Granfield to be eventually paid to the sellers. We may assume that since the contract between them contemplated the acquisition of the money by fraud neither party could have enforced any of its stipulations. Nevertheless, when Primeau got the money, it was his, in equity as at law, and all of it remained his money after it went into Granfield's hands, because Granfield took it only as his agent. Allowing to the utmost the invalidity of all the stipulations of the contract, the fact remains that Primeau's rights to the money are quite independent of the enforcement of any part of the contract, even if he had acquired it through the past performance of the contract. When Granfield took it as agent, there remained nothing to be done, under the contract, but his payment of it to the supposed sellers, and that was an obligation that Primeau does not seek to enforce. He relies wholly upon his ownership of it once acquired, Granfield's possession of it as agent, and his failure to pay it over in accordance with his principal's instructions. Even a wrongdoer is not the prey of any spolia-

tor who may outwit him. It is true that the law will enforce no part of a contract the performance of any stipulation of which is forbidden, but the parties do not become outlaws when they make such a contract, and their rights in equity as well as at law are the same as those of others, in so far as they do not require the enforcement of any part of the contract. This is the result of the following cases, all of which were in equity: *Sharp v. Taylor*, 2 Phil. Ch., 801; *Harvey v. Varney*, 98 Mass., 118; *Heath v. Van Cott*, 9 Wis., 516; *Trice v. Comstock*, 121 Fed., 620, 57 C. C. A., 646, 61 L. R. A., 176; *Owens v. Owens*, 23 N. J. Eq., 60; *American Association, Ltd., v. Innis*, 109 Ky., 595, 60 S. W., 388; *Pitzle v. Cohn*, 217 Ill., 30, 75 N. E., 392.

"I do not at all agree with Primeau that the iniquitous conduct which will bar a suitor in equity must be directed against the defendant. The rule in trade-mark cases is quite enough to disprove that limitation of the rule at the present time, however it may have been originally. On the other hand, I do agree with him that the conduct must be such that *the prosecution of the suitor's rights will of itself involve the protection of wrongdoing*. It is quite true that again in the trade-mark cases the false representations which disqualify the complainant need not be a part of the very trade-mark which the complainant wishes to protect (*Manhattan Medicine Company v. Wood*, 108 U. S., 218, 2 Sup. Ct., 436, 27 L. Ed., 706), but they must be used in immediate association with the trade-mark. While the cases do not explicitly so decide, I think the proper interpretation is that the association of the misrepresentation must be so close that they may be regarded as together one statement made to the public. There is at least no indication in any of the cases that if the owner of the trade-mark had used a similar misrepresentation in a way quite disconnected with the trade-mark, although it was to effect the sale of his goods, such misconduct would put his whole business at the mercy of fraudulent competitors. In short, the 'transaction,' which must be illegal in order to defeat him, is the entire representation of which the mark is fairly a part. Since, therefore, Primeau need not rely upon the illegal contract, but only upon rights which arose through its performance, I will not dismiss his bill."

In *Chute v. Wisconsin Chemical Company*, 185 Federal, 115 (C. C. E. D., Wisconsin), at page 118, the same distinction is commented upon fully.

In *Bentley v. Tibbals* (C. C. A., 2nd Circuit), 223 Fed., 247, at page 252, the court refused to apply the doctrine of unclean hands to a case where the plaintiff had violated the United States laws in importing a book not copyrighted in the United States, and sought to enjoin the defendants from pirating certain portions of the book, although it held that the injunction should be denied upon other grounds.

"We do not, however, think the maxim invoked is applicable to the case before the court. The maxim does not apply to every unconscientious act or inequitable conduct of the plaintiff. It is limited to misconduct connected with the matter in litigation, and does not apply to misconduct which is unconnected with the matter in litigation. 1 *Pomeroy's Eq. Jur.*, § 399. It is true that complainant violated the law of the United States in importing the Phrase Code into this country and selling it here. But, as was pointed out in *Kinner v. Lake Shore, etc., R. Co.*, 69 Ohio St., 339, 344, 69 N. E., 614, 615 (1903):

" 'A court of equity is not an avenger of wrongs committed at large by those who resort to it for relief.'

"It is not sufficient to debar a suitor for relief that he has committed an unlawful act, unless that unlawful act affects the matter in litigation. The offense which Bentley committed in wrongfully importing the work was not a wrong done to this defendant, or one which in any wise prejudiced him. It was an offense committed against the United States, and one of which it alone could take cognizance. The unlawful importation and vending of the book here is not so connected with the subject-matter of the present suit as to justify the application of the maxim to the plaintiff's suit."

In *Talbot v. Independent Order of Owls*, 220 Fed., 660 (C. C. A., 8th C.), the court said:

"Nor does the evidence which is found in this record upon which the defendants rely to defeat the plaintiffs, and to bring this suit under the ban of the principle, 'He who comes into equity must come with clean hands,' sustain that defense. That principle does not repel all sinners from the precincts of courts of equity, nor does it disqualify any plaintiff from obtaining full relief there who has not done inequity in the very transaction concerning which he complains. The wrong which may be invoked to defeat him must have

an immediate and necessary relation to the equity for the enforcement of which he prays."

In *Thompson Company v. American Law Book Company*, 122 Federal, 923, the court refused to grant a preliminary injunction upon the precise distinction between bodily appropriation and the tip practice, to which we later refer. The Court said :

" There is no pretense that a word of the complainants text has been copied ; in fact the defendant's editors were not permitted to open the complainant's books. The list of cases furnished the editors was not copied in the defendant's work and the only use made of the list was as a guide to the volumes where the cases were reported."

The Court, however, intimated the opinion, without deciding, that if the defendant was pirating citations from the plaintiff's encyclopedia, the plaintiff was not entitled to relief because many of the very citations which the plaintiff sought to enjoin the defendant from copying had been copied by the plaintiff from other works. Thus the plaintiff was endeavoring to protect literary property already in existence, which very property he had secured by the inequitable practices which he sought to enjoin.

Other cases holding the same proposition are :

American Sugar Refining Co. v. McFarland, 229 Fed., 284 (D. C., E. D. La.). See especially passage on page 287 and the passage in the Supreme Court's opinion on the appeal, 241 U. S., 85.

Cropper v. Davis, 243 Fed., 316 (C. C. A., 8th C.).

Trice v. Comstock, 121 Fed., 620 ;

Heller et al. v. Shaver, 108 Fed., 821 ;

Knapp v. Jarvis Adams Co., 135 Fed., 1008 ;

Mason v. Carrothers, 74 Atl., 1030 (Me.) ;

Yale Gas Stove Co. v. Wilcox, 25 L. R. A., 90 (Conn.) ;

Lord v. Smith, 71 Atl., 430, 433 (Md.) ;

Munn v. Americana Co., 91 Atl., 87, 88 (N. J.) ;

Luebke v. Salzwedel, 147 N. W., 831, 832 (Wis.) ;

Employing Printers Club v. Blosser Co., 50 S. E., 354 (Ga.) ;

Lonestar Salt Co. v. Blount, 107 S. W., 1163 (Texas).

2. If the employees of the respondent had indulged in the practice complained of without authority, that would not con-

stitute a defense for the additional reason that, in the application of this maxim of equity, the principal does not become responsible for the unauthorized acts of its agents.

Upon this point there is a fundamental distinction between the position of the complainant and defendant in this case in respect to responsibility for any acts of agents. The complainant's relation to the problem is solely one of its moral standing and the doctrine of *respondet superior* has no application.

It is essential to this defense of "unclean hands" to show unlawful practices *authorized or approved by those responsible for the policies of The Associated Press*. Even proof of a general practice would not suffice, unless it were known or approved by those responsible for the complainant's management. But defendant did not assume to show even a general practice. The few sporadic instances referred to by the defendant's affiants, even if wholly true, state nothing but that a few minor employees had violated what our affidavits show to be the definite, invariable and well understood regulations and policies of the complainant.

The proposition of law that the unauthorized act of an agent cannot convict the principal of "unclean hands" so as to bar the principal from equitable relief will not be disputed, but the following authority approved by the District Court in this case directly supports the point :

Vulcan Detinning v. American Can Co., 72 N. J. E., 387 ; 67 Atl., 339 ; 122 R. S. (N. S.), 102.

In that case was presented the precise question whether the guilt of an agent will be imputed to his principal so as to bar the principal from equitable relief. The court held that it would not and said, in reversing the decision below :

" Having reached this conclusion as to the imputation of Kern's knowledge to the complainant, the vice-chancellor further concluded that the effect of such imputation was to render the hands of the complainant unclean within that maxim of equity by which a deaf ear is turned to a suitor in a court of conscience regarding a matter in respect to which his own conduct has been unconscionable.

" In reaching this last conclusion the learned vice-chancellor fell, we think, into the error of ascribing an

unconscionable status to the complainant by force of a presumption of remedial law that in its most extreme application affects only the legal rights of parties and not at all their moral standing. * * *

" * * * True, he may be bound by it in the sense that his legal rights may be determined with reference to the knowledge with which he is thus chargeable, but his conscience is void of offence, and hence it cannot with any propriety be said that his hands are unclean, for 'unclean hands' within the meaning of the maxim of equity is a figurative description of a class of suitors to whom a court of equity as a court of conscience will not even listen because the conduct of such suitors is itself unconscionable, i. e., morally reprehensible as to known facts."

On the other hand, the defendant's relation to the case is not one of its moral standing alone. The doctrine of *respondeat superior* applies in all of its legal effects.

In the above quoted case the court went on to hold that, so far as the *defendant* was concerned, the doctrine of *respondeat superior* did apply, and the guilt of his agent, unknown to the defendant, would render the defendant subject to injunction.

It is therefore wholly immaterial, for example, that Mr. Carvalho, President of the defendant, does not know of the practices, which is the sole sum and substance of his affidavit. The defendant is directly responsible for all the acts of its agents, however unauthorized or even unknown, and the complainant was entitled to the injunction to prevent the unlawful acts of the defendant or of any of its agents done in the course of their employment.

SECOND : Defendant's contention that the complainant has obtained news by the same methods as those used by defendant was not sustained in fact.

The order of the District Court shows that the Court so found (Findings 7 and 8, p. 6), and its findings are confirmed by the Court's opinion, as well as by that of the Circuit Court of Appeals.

The record fully supports the findings of the Court that the complainant has not used the practices, in which the defendant is found to have engaged, and has not taken news

bodily from another service and republished it without original investigation, but has only used information so obtained as a basis for independent investigation and report.

Upon this point it is essential to notice the clear and vital distinction between the two kinds of use to which news taken from newspapers may be put.

1. The one use is to send out a story based in whole or in part upon the news obtained from the newspaper without independent investigation or expense. This use may include the sending of a bare statement of the fact of the event, or a more extended copy of the details of the story of the rival news agency. This is the use practiced by the defendant which the complainant seeks to enjoin. This practice has never been recognized as fair or proper among news agencies or newspapers and has never been adopted or authorized by the complainant as the District Court found. It appears by the overwhelming evidence that any such practice has been definitely prohibited by those responsible for the management of the complainant; that this prohibition has been thoroughly disseminated through the service of the complainant; and that if any such acts have occurred in sporadic cases, they have been directly opposed to the definite, invariable and well-understood policy of the complainant.

The defendant in its supplemental brief (p. 6) admits that "there is nothing in the record here to show that complainant rewrote, transmitted and sold the information and news so obtained without the prior verification thereof by it."

General statements, without specific instances, that stories were sometimes rewritten by the complainant occur in some of the defendant's affidavits, made for the most part by men formerly employed by the complainant but now in the employ of the defendant or of the "New York Evening Journal."

Such statements in the affidavits are specifically and completely answered as follows: Sartwell, p. 161, by Elliott, p. 89; Baskerville, p. 163, by Cowles, p. 91, and Marshall, p. 92; Schwinger, p. 166, by Rennick, p. 93; Harvey, p. 167, by Harold Martin, p. 94; Hogan, p. 169, by Cowles, p. 95; and Thrush, p. 171, by Cowles, p. 96, and Wyrick, p. 97.

These statements are also refuted by the affidavits of the managers and superintendents of the complainant.

Melville E. Stone, general manager (p. 60) :

" It has never, so far as deponent knows, taken such news, surreptitiously or otherwise, from the bulletins or the dispatches of any rival news agency or from any newspaper which was not represented by membership in The Associated Press ; that if any such appropriation of news had been made by the agents or representatives of The Associated Press, deponent would have been likely to have known of it and that it would have been directly opposed to the long standing and well understood policy of this organization."

Cooper, chief of traffic department (p. 85) :

" The only use of rumors is for the information of our correspondents in the district where the event is reported to have happened. Any story sent to the members of The Associated Press is based solely upon news obtained by these correspondents from original sources, and if no such information can be obtained no story is sent out. This is the definite and invariable rule of The Associated Press, and any employee discovered violating it would be dismissed from the service."

Elliott (p. 90) :

" It is the definite, invariable and well understood policy of The Associated Press to base no stories upon tips received from opposition services. I have communicated this regulation to every man that I have employed."

Marshall (p. 92) :

" I deny that it is the custom or practice of The Associated Press to re-write * * * a story and send it out to the members of The Associated Press. Employees of The Associated Press are specifically instructed never to do so in a single instance."

Martin, at page 62 confirms Stone's statement and again at page 94, says :

" During all of said time * * * it was the rule and custom of The Associated Press to my own personal knowledge that no matters published in any non-Associated Press papers should be re-written for publication in The Associated Press service."

Cowles (p. 96) :

" The only authorized use of news items appearing in newspapers not represented by membership in The Associated Press was for the sole and only purpose of obtaining the information that a certain event was

said to have happened, whereupon the representatives of The Associated Press would undertake an independent investigation of the facts and write the story solely upon the strength of this independent investigation."

Defendant's brief at page 14 quotes an order from Mr. Stone as authorizing the practice which we deny. Copp's affidavit (Record, p. 87) shows that this order did not relate at all to this alleged practice but referred only to the duty of complainant's operators in the newspaper offices of its members to promptly furnish it important local news of events occurring in their respective cities.

2. The other use is to obtain the mere information that a reported event has happened. Upon receipt of this information or rumor the news agency then proceeds, not to verify the news, but to obtain the news by its own independent investigation from the original sources at its own expense and the only story sent out is based solely upon the strength of such investigation. This is the practice which complainant admits in the past and which it has been and still is willing that defendant should employ. Most of defendant's affidavits refer solely to this practice, and the defendant's chief claim is that this practice is equally culpable with its own practice.

It has been a recognized practice among all news agencies and newspapers and has existed by common consent, and, as the District Court found (Findings 7 and 8, p. 6), and the affidavits just referred to show, is the only one authorized or adopted by the complainant.

This practice is known as the practice of "tipping off" news, and seems to us a reasonable and proper practice. A news event develops. It is reported and comes into the knowledge of the public at some point touched by the wires and correspondents of The Associated Press. How the knowledge of the happening has come to the public consciousness is not always clear. Sometimes it is a rumor, spread from mouth to mouth, and its origin may not be traceable. At other times the report is printed in a newspaper—and perhaps in a newspaper which is not allied with The Associated Press. It has been the custom of The Associated Press correspondents to report to the organization the existence of such a rumor or re-

port. The practice has not been concealed. No one connected with a competing newspaper or news agency has been bribed, induced or solicited to disclose the matter. Neither money nor any valuable consideration, nor even an unrewarded request has been used.

This "tip" when received by The Associated Press is used, not textually nor in any modified form as a despatch to the papers within its fold, for publication by them, but as a suggestion for investigation. An inquiry is set on foot and an independent news report may be developed and used. There has been no secret about this practice. It has been openly avowed in our affidavits. It has generally obtained with all of the news-gathering organizations as admitted by the affidavits and argument of the defendant in this proceeding. Where a tip is thus taken from a newspaper and independently investigated, the news thus obtained from such independent investigation is just as much the product of the complainant's effort and entitled to protection as its property as if it had been obtained by its investigations from a tip otherwise received or without any tip.

Moreover, there is an element of news in the very investigation and verification itself in which the public has a vital interest. If such an item of news were investigated and found to be without foundation, and that fact were reported by the complainant and published by its members, that would unquestionably be a distinct and original item of news obtained by the complainant and constituting its own property. The converse must equally be true, that if by such investigation it finds the tip to be substantially correct and independently gathers its own report, there is an element of news in the very corroboration of the story otherwise published, and clearly the story which the complainant thus gathers and formulates as the result of its own independent investigation and corroboration, belongs to it. and is entitled to protection as its property. We believe therefore that this "tip" practice is not in any sense unjust or unlawful and does not constitute unfair competition. Certainly not so long as the practice exists by common consent. But in any event it is certainly very different from the bald appropriation of news despatches and their re-sale, either in textual or paraphrased form.

First, assuming that our report had its birth in a suggestion from a news despatch of another organization, our expense for the investigation and the securing of our own independent news telegram would doubtless be greater than the original message of our competitor. As a result we could not undersell him. Second, as has been noted, the life of a news telegram is short; "it struts its hour upon the stage and then is heard no more." The time required to secure our independent investigation and telegram as to all foreign news and the most important part of domestic news, would give a competitor the full benefit of the salable period for his own.

Upon no conceivable ground can the fact of this practice bar complainant from relief as to the entirely different practice which it seeks to enjoin. In so far as complainant's rights are founded upon its property right in the news it has gathered, it can grant to others one form of use of its property and deny to them another form of use. Nor should complainant lose the right to enjoin the form of use it has denied because of a practice on its part of the form of use it has freely granted to others.

In so far as complainant's rights are founded upon the doctrine of unfair competition, a practice that has existed by common consent manifestly cannot be unfair. Nor can it justly bar complainant from relief against a practice which has not been recognized as fair and which is fundamentally unfair and unlawful.

It should be remembered that the defendant has freely consented to the use by complainant of defendant's news for the purpose of "tip," just as complainant has consented to a correlative right on the part of the defendant. Thus the contention of counsel for the defendant resolves itself into this untenable position, namely, that the complainant should be denied an injunction against an unauthorized and unlawful appropriation of its property, on the ground that the complainant has engaged in an entirely different practice to which the defendant has fully consented and which complainant has also conceded to defendant.

A further important distinction between the two practices lies in the fact that news sent out as a result of investigation suggested by a "tip" involves no misrepresentation to the

public, because the item as published has in fact the authority of complainant's own independent investigation ; whereas the defendant's practice of bodily appropriation necessarily involves either one of two misrepresentations—if the defendant publishes the item as its own report from the place and date of origin it pretends that the news has the backing of its own independent service, which is not the fact ; and if the defendant publishes the item as Associated Press news, it pretends that it has the right to The Associated Press service, which again is not the fact.

A very strong consideration of public policy also enters into the question. The system whereby each news agency can check the accuracy of the reports of other agencies is the strongest guaranty of reliable news reports. It often happens that one news service does not have a report which another has distributed, for the sole reason that the event as reported never happened. The right of another news agency to use the report as a tip for investigation on its own account is vital to the public need of correct information. Not only is an erroneous report thus corrected, but this possibility of checking a report makes for greater care and for fewer wrong and exaggerated reports.

The validity of this distinction has also been recognized by the courts. *Thompson Co. v. American Law Book Co.*, 122 Fed., 922, and *West Publishing Co. v. Thompson Co.*, 176 Fed., 833. These were cases involving the use of law encyclopædias by a rival publisher. In the first case the Court said : "There is no pretense that a word of the complainant's text has been copied * * *. The list of cases furnished the editor was not copied in the defendant's work and the only use made of the list was as a guide to the volumes where the cases were reported". The Court cited several cases as follows :

"In *Pike v. Nicholas*, L. R. 5 Ch. App. 263, it was held that the defendant was not permitted to copy a passage from another author directly from the plaintiff's work, 'but having been put on the track, and having looked at that particular part of the book which the plaintiff led him to, he was entitled make use of every passage from that author which the plaintiff had made use of.'

" 'In *Morris v. Wright*, L. R. 5 Ch. App. 287, it was decided that if the defendant 'used the plaintiff's book in order to guide himself to the persons on whom it would be worth his while to call, and for no other purpose, he made a perfectly legitimate use of the plaintiff's book.'

" In the case of *Moffat v. Gill*, 86 Law Times Rep., 465, * * * the court says :

" 'You cannot, where another man has compiled a directory, simply take his sheets and reprint them as your own. You are entitled, taking the sheets with you, to go and see whether the existing facts concur with the description in the sheets, and if you do that you may publish the result as your own.'

" To the same effect is *List Pub. Co. v. Keller* (C. C.), 30 Fed., 772 ; *Jarrold v. Houlston*, 3 Kay & J., 708 ; *Simms v. Stanton* (C. C.), 75 Fed., 6 ; *Macgillivray on Copyright*, 103 ; *Mead v. West Pub. Co.* (C. C.), 80 Fed., 380."

In the later case of *West Publishing Co. v. Thompson Co.* (*supra*) the same distinction was expressly and clearly recognized at page 838 :

" Such persons may cut out parts of the digests to assist them in running down cases and keep lists of cases from the digest as many of the defendant's readers have done. Such a use of the digests seems to us, differing in this respect from the court below, to fall directly within the purpose for which they are sold and to be fair ; on the other hand, extensive copying or paraphrasing of the language or the syllabi would not, we think, be a fair use ".

CONCLUSION.

**It is respectfully submitted that the decree of
the Circuit Court of Appeals should be affirmed.**

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